TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~237~~ 66

JULIUS SILVERMAN, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 6, 1960
CERTIORARI GRANTED MAY 31, 1960

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JOINT APPENDIX

Docket Entries

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 1135-'58

Case Closed

Parties

UNITED STATES

vs.

1. JULIUS SILVERMAN
2. ROBERT L. MARTIN
3. MEYER SCHWARTZ

Attorneys

U. S. Attorney Flannery

1. E. B. Williams, 1000 Hill Bldg. 1.
2. T. A. Wadden, Jr.—1000 Hill B. 2.
3. T. A. Wadden, Jr.—1000 Hill B. 3.

G. J. No.—Orig.

Charge: Vio. T. 22, D CC, Secs. 1502, 1504, 1505, 1508, T. 26, USC, Sec. 7262

Date Filed	Bond:
1. 12-8-58	$1000.00 M. C. Ryan
1. 6-5-59	$1000.00 M. C. Ryan
2. 12-8-58	$1000.00 M. W. O'Connor
2. 6-5-59	$1000.00 M. W. O'Connor
3. 12-8-58	$1000.00 M. W. O'Connor
3. 6-5-59	$1000.00 M. W. O'Connor

Date	No. 1, 2, 3: Proceedings
1958 Dec. 2	—Presentment and Indictment Filed (5 counts)
1958 Dec. 5	—No. 1, 2, 3: Bench Warrant Ordered and Issued. McLaughlin, J. (Reporter—Mallon)

1958 Dec. 8—No. 1, 2, 3: Copy of indictment given to defendant in open Court;

Arraigned, Plea Not Guilty entered;

Bond Set by the Court in the sum of $1000.00., Defendant Granted 10 days to file motions, etc., Trial date set for 1-26-59;

No. 1: Recognizance in the sum of $1000.00 taken with M. C. Ryan, Surety, filed.

No. 2, 3: Recognizance in the sum of $1000.00 taken with M. W. O'Connor, Surety, filed.

No. 1: Attorney Vincent Fuller present for E. B. Williams.

No. 2, 3: Attorney Myron Ehrlich present.

Holtzoff, J. (Reporter—Nevitt) Cert. filed.

1958 Dec. 16—No. 1: Appearance of Edward Bennett Williams entered and filed.

1958 Dec. 17—No. 1, 2, 3: Motion of Defendant for return and suppression of evidence, Points and Authorities in support thereof, Schedule of Property seized and exhibit B, filed. Cert. of Service.

1958 Jan. 7—No. 1, 2, 3: Answer of Government to deft's. motion for return and suppression of evidence, filed. Cert. of Serv.

1959 Jan. 9—No. 1, 2, 3: Motion of Defendant for return and suppression of evidence, Points & Authorities, Schedule of property seized and Exhibit B, Denied.

No. 1: Attorney E. Bennett Williams present.

No. 2, 3: Attorney Myron Ehrlich present.

Youngdahl, J. (Reporter—O'Neal) Cert. filed.

1959 Jan. 15—No. 1, 2, 3: Order Denying motion of defendant for return and suppression of evidence, filed. Youngdahl, J.

1959 Mar. 13—No. 2, 3: Appearance of Thomas A. Wadden, Jr. entered.

1959 Mar. 16—No. 2, 3: Appearance of Myron G. Ehrlich as attorney for defendant entered withdrawn per praecipe, filed. (Fiat) Letts, C.J.

1959 Mar. 16—No. 1, 2, 3:
Jurors from Criminal Court No. 6 and Civil Jurors Sworn on Voir Dire; Jury Sworn:
George King, Willis S. Jenkins, James B. Mason, Mary L. Murphy, Joseph A. Hawkins, George S. Beverly, George W. Hayden, Lena P. Richburg, Ulysses G. Shelton, Minnie E. James, Elvira E. Chase, Lillie E. Herbert
Court directs the calling of two alternate jurors who are called and sworn: a.1. Jerome M. Edelstein a.2. Lillian S. Rodbell
Trial Begun:
Case is Respited until Wednesday 3-18-59.
Defendant On Bond;
Points & Authorities in support of motion of defendants for return and suppression of evidence and Affidavit, filed.
Attorneys Thomas Wadden and E. Bennett Williams present.
Jackson, J: (Reporter—Doran) Cert. filed.

1959 Mar. 18—No. 1, 2, 3:
Trial Resumed; same jury;
Case is Respited until to-morrow morning;
Defendant On Bond;
No. 1: Attorney Edward Bennett Williams present.
No. 2: Attorney Thomas Wadden present.
No. 3: Attorney Thomas Wadden present.
Jackson, J. (Reporter—Doran) Cert. filed.

1959 Mar. 19—No. 1, 2, 3:
Trial Resumed; same jury;
Case is Respited until to-morrow morning;
No. 1: Attorney Edward Bennett Williams present.
No. 2, 3: Attorney Thomas Wadden present.
Jackson, J. (Reporter—T. Doran & P. Mallon) Cert. filed.

1959 Mar. 20—No. 1, 2, 3:
Trial Resumed; same jury;

Case is Respited until Monday 3-23-59 at 10:00 a.m.;
Court Orders Transportation for Jurors (5).
Court Orders Food for Jurors (8).
No. 1: Defendant On Bond;
Attorney E. Bennett Williams present.
No. 2, 3: Defendant On Bond;
Attorney Thomas Wadden present.
No. 1, 2, 3: Jurors Placed in Custody of the U. S. Marshal to return into Court Mon. morn. 3-23-59 at 10:00 a.m.
Jackson, J. (Reporter—T. Doran & P. Mallon)
Cert. filed.

1959 Mar. 23—No. 1, 2, 3:
Trial Resumed; same jury;
Case is Respited until tomorrow at 1:45 p.m.;
Jury and two alternate jurors Placed in Custody of the U. S. Marshal to Return into Court tomorrow at 1:45 p.m.
Court Orders Food for Jury (2);
Court Orders Transportation for Jury (1);
Affidavit of Defendant, filed.
Points and Authorities of Defendants in support of Motion to dismiss Count 2, filed.
Memo. of Government in opposition to motion "for Judgment of Acquittal" on Count 2, filed.
No. 1: Attorney Edward Bennett Williams present.
No. 2, 3: Attorney Thomas Wadden present.
Jackson, J. (Reporter—T. Doran and K. Byrholdt)
Cert. filed.

1959 Mar. 24—No. 1, 2, 3:
Trial Resumed; same jury;
Alternate Jurors discharged;
Jury Retires to Deliberate;
Court Orders Food for Jury;
Verdict: Guilty on Counts 1, 2, 3;
Jury Polled;
Not Guilty on Counts 4 & 5;

Case is Referred to the Probation Officer of the Court;

Defendant permitted to Remain On Bond pending sentence;

Defendant's prayers 1-11, filed.

Government's prayers 1-4, filed.

No. 1: Attorney E. Bennett Williams present.

No. 2, 3: Attorney Thomas Wadden present.

Jackson, J. (Reporter-Doran) Cert. filed.

1959 Mar. 27—No. 1, 2, 3:

Order that all exhibits in evidence be delivered forthwith and impounded by the Clerk of the Court, filed, Jackson, J. (N)

1959 Apr. 3—No. 1, 2, 3:

Motion of Defendant for judgment of Acquittal notwithstanding the verdict and Memorandum of Points and Authorities in support thereof, filed. Cert. of Serv.

1959 Apr. 15—No. 1, 2, 3: Answer of Government to Deft's motion for judgment of aequittal notwithstanding the verdict or for a new trial and Memorandum and Points & Authorities in support of the Government's answer in support thereof, filed. Cert. of Serv.

1959 Apr. 17—No. 1, 2, 3: Motion of Defendant for Judgment of Acquittal notwithstanding verdict or New Trial heard and Denied.

Attorney Thomas Wadden present.

Jackson, J. (Reporter—Williamson) Cert. filed.

1959 May 29—No. 1, 2, 3:

Sentenced to imprisonment for a period of Nine (9) Months and to Pay a Fine of $500.00 on each of Counts 1 and 3;

Twenty (20) Months to Five (5) Years on Count 2;

1959 May 29—No. 1, 2, 3: (Cont'd.)

said sentence by the Counts to Run Concurrently. Deft. allowed to Remain on Bond Pending Appeal;

No. 1: Attorney E. Bennett Williams present.

No. 2: Attorney Thomas Wadden present.
No. 3: Attorney Thomas Wadden present.
Jackson, J. (Reporter—Williamson) J.I.

1959 Jun. 1—No. 1, 2, 3: Judgment & Commitment of 5-29-59, filed. Jackson, J.

1959 Jun. 3—No. 1, 2, 3: Notice of Appeal from Judgment, filed.
Clerk's Fee of $5.00 Paid and credited to the United States.

1959 Jun. 4—No. 1, 2, 3: Appeal Bond set by the Court in the sum of $1,000.00. Jackson, J.

1959 Jun. 5—No. 1: Recognizance on Appeal in the sum of $1,000.00 taken with M. C. Ryan, Surety, filed.

1959 Jun. 5—No. 2, 3: Recognizance on Appeal in the sum of $1000.00 taken with M. W. O'Connor, Surety, filed.

Filed Dec. 2, 1958

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Impanelled October 30, 1958,
Sworn in on November 4, 1958

Criminal No. 1435-58

Grand Jury No. Orig.

Vio. 22 D.C.C. 1502, 1504, 1505, 1508
26 U.S.C. 7262

THE UNITED STATES OF AMERICA

v.

JULIUS SILVERMAN
ROBERT L. MARTIN
MEYER SCHWARTZ

The Grand Jury charges:

On or about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz knowingly had in their possession and under their control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in violation of Title 22, District of Columbia Code, Sections 1504 and 1508.

SECOND COUNT:

Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz set up and kept a gaming table at premises located at 408 Twenty First Street, Northwest, for the purpose of betting on the results of baseball games, prize fights and boxing matches.

THIRD COUNT:

Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz did knowingly, as lessees, agents, operators and occupants, maintain, aid and permit the maintaining of a gambling premises located at 408 Twenty First Street, Northwest.

FOURTH COUNT:

Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz did accept bets and wagers, gamble and make book on the results of athletic contests, that is to say, baseball games, prize fights and boxing matches.

FIFTH COUNT:

Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz were engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

OLIVER GASCH
Attorney of the United States in and for the District of Columbia

A TRUE BILL:
HARVEY BURK
Foreman.

Filed December 17, 1958

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Criminal No. 1135-58

UNITED STATES OF AMERICA

v.

JULIUS SILVERMAN, ROBERT L. MARTIN, MEYER SCHWARTZ,
Defendants

Motion for Return and Suppression of Evidence

Defendants hereby move this court to suppress and order the return of the fruits of the illegal search and seizure of the premises at 408 21st Street, N. W., in the District of Columbia, by which they were aggrieved within the purview of Rule 41 of the Federal Rules of Criminal Procedure. Defendant Martin at all times pertinent to this case was lessee as well as an occupant of the aforesaid premises. Property was unlawfully seized at 5:20 p.m. on April 30, 1958 by one Sergeant William D. Foran of the Metropolitan Police Department. A schedule of said property is annexed hereto as Exhibit A. Defendants further move this court to direct that any transcriptions, records, notes or other evidence, written or oral, of alleged conversations within said premises overheard by federal officers, including but not limited to the conversations referred to in the affidavit attached hereto as Exhibit B, be suppressed as evidence against them in any criminal proceedings.

In support of this motion, defendants rely upon the following grounds:

1. The property listed in Exhibit A was seized under the purported authority of a search warrant which was in-

valid because the supporting affidavit was based upon information secured in violation of their rights under the Fourth Amendment and § 605 of the Federal Communications Act, 47 U.S.C. § 605.

2. The search warrant was unlawfully executed.

3. There was not probable cause for believing the existence of the grounds on which the warrant was issued.

4. The alleged conversations were overheard by federal officers in violation of defendants' rights under the Fourth Amendment and § 605 of the Federal Communications Act, 47 U.S.C. § 605.

5. And such other and further reasons as may be presented at the oral hearing on this motion.

/s/ Edward Bennett Williams
Edward Bennett Williams
Attorney for Defendant Silverman
1000 Hill Building
Washington 6, D. C.

/s/ Myron G. Ehrlich
Myron G. Ehrlich
Attorney for Defendants
Schwartz and Martin
401 Third Street, N. W.
Washington 1, D. C.

A copy of the foregoing Motion was mailed, postage prepaid this 17th day of December, 1958, to Oliver Gasch, United States Attorney, United States Court House, Constitution Avenue and John Marshall Place, Washington, D. C.

/s/ Edward Bennett Williams

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Criminal No. 1135-58

UNITED STATES OF AMERICA

v.

JULIUS SILVERMAN, ROBERT L. MARTIN, MEYER SCHWARTZ,
Defendants

Schedule of Property Seized

A quantity of baseball and prize fight bet slips.

A quantity of records giving the odds on fight and baseball bets, fight performance records.

A large quantity of paper pads, pencils and related office supplies.

3 telephones, Di 7-3554-5 & 6.

2 Table lamps, extension type for office use.

1 Numechron electric time clock.

1 Motorola "600" Portable radio.

1 Perforated metal basket.

2 Pieces of cloth used for window blind.

1 Pepco Electric bill in name of Robert L. Martin.

EXHIBIT B

Statement of Facts Relative to Request for a U. S. Commissioner's Search Warrant for Premises Described Below and Arrest Warrants for the Individuals Described Below for Violations of the Gambling Laws of the District of Columbia and for Violation of the Federal Wagering Tax Statutes

Search Warrant;

408-21st Street, northwest, Washington, D. C., a row house, designated by the numerals 408 on the doorway of same; according to C & P Telephone records these premises are occupied by Perry Fredericks, a promoter of new products in the radio and television field.

Arrest Warrants:

Julius Silverman, white, male, 49 years, 5' 7¾", 150 lbs., limps in right leg, right hand partly paralyzed.

John Doe # 1—white, male, about 49 yrs., 5' 5", 160 lbs., gray hair, ruddy complexion, medium build.

John Doe # 2—white, male, 40-45 yrs., 5' 11", 185 lbs., dark complexion, dark hair receding in front and thin on top.

After receiving information from a reliable source that telephone District 7-3554 was being used to conduct a gambling operation, Detective Jesse R. Stone, Morals Division, Metropolitan Police Department, and Special Agents William H. Jewell and Arnold G. Bedingfield, Intelligence Division, Internal Revenue Service, were assigned to make an investigation. Investigation revealed that the above telephone, along with District 7-3555 and District 7-3556, are listed to Perry Fredericks, a promoter of new products in the radio and television field, and are located at 408-21st Street, northwest, Washington, D. C.

At about 7:00 p.m., on April 21, 1958, Agents Bedingfield and Jewell observed a black 1954 Chevrolet bearing D. C. Tags JW 143, and registered to Nancy Silverman, parked between the sidewalk and building located on the northwest corner of 21st and Virginia Avenue, northwest, Washington, D. C. At about 9:58 p.m., Detective Stone and Agent Bedingfield observed a two-tone Buick automobile, Pennsylvania tags A 47-717, registered to Evelyn Schwartz, park in the parking lot across the street from 408 - 21st Street, northwest, and a white male, about 5' 5", 160 lbs., gray hair, medium build, approximately 49 yrs. of age, believed to be Meyer Schwartz, who has an extensive record of gaming arrests and convictions in Pittsburgh, Pennsylvania, and who will hereafter be referred to as John Doe # 1, emerged and entered these premises 408 - 21st Street, northwest. At about 11 p.m. Agents Bedingfield and Jewell and Detective Stone observed Julius Silverman, John Doe # 1 and a white male, 40-45 yrs. of age, 5' 11", 185 lbs., dark complexion, dark hair, receding in front and thin on top, hereafter referred to as John Doe # 2, leave the premises 408 - 21st Street, northwest, Washington, D. C., and drive away in the previously described black Chevrolet, bearing D. C. tags JW 143. Julius Silverman is known to Detective Stone and Agents Jewell and Bedingfield by sight and is further known by them to have an arrest record for gambling violations. Julius Silverman was arrested on 9/4/51 and charged with setting up a gaming table and operating a lottery. He has been the subject of numerous complaints in the files of the Morals Division, Metropolitan Police Department, and has been the subject of previous investigations by members of the Morals Divisions for gaming violations. Julius Silverman further has a local reputation as a professional bookmaker, specializing in wagers on sporting events, with out of town connections.

On April 22, 1958, at about 10:58 a.m., Agents Jewell and Bedingfield observed John Doe #1 and John Doe #2 enter the premises 408-21st Street, northwest, Washington, D. C. At about 11:05 a.m., Agents Jewell and Bedingfield observed Julius Silverman enter premises 408-21st Street, northwest, Washington, D. C. From 11:05 a.m. to 3:00 p.m., Agents Jewell and Bedingfield were able from their place of observation to overhear numerous conversations by three male voices within 408-21st Street, northwest, relating to gambling activities, such as the quoting of odds and accepting of wagers over the telephone. Some of the more frequent odds quoted were: Baltimore-Washington, pick em; Chicago White Sox-Detroit, pick em; New York 7 to 8; Milwaukee 6½ to 7½; St. Louis-San Francisco, pick em; Los Angeles 7½ to 8½; Harshman 10 to 20 over Lumenti; Wynn and Hoeft, pick; Sturdivant 50 to 60 over Sisler; Garver 10 to 20 over Lemon; Buhl 30 to 40 over Kline; and Podres 55/65 over Droft. Some of the wagers which were accepted are: $60.00 to $50.00 on Baltimore; $120.00 on Washington; Detroit and Kansas City parlay for $60.00; $300.00 on Kansas City; $100.00 on Garver over Lemon; $150.00 to $125.00 on Baltimore; $36.00 to $30.00 on Baltimore; and $275.00 to $250.00 on Detroit with the explanation "you are putting up $275.00 to win $250.00." At about 2:15 p.m. Julius Silverman left the premises 408-21st Street, northwest, Washington, D. C.

On April 23, 1958, at about 10:48 a.m., Detective Stone and Agents Bedingfield and Jewell observed the previously described two-tone Buick automobile, Pennsylvania tags A 47-717 stop in front of the premises 408-21st Street, northwest, Washington, D. C., and John Doe #2 emerged and entered these premises. At about 10:54 a.m., John Doe #1 returned on foot and entered premises 408-21st Street, northwest. From 10:54 a.m. until 8:00 p.m.,

Detective Stone and Agents Jewell and Bedingfield were able to overhear numerous conversations by two male voices from within 408 - 21st Street, northwest, relating to gambling activities, such as the quoting of odds and accepting of wagers over the telephone on baseball games and a boxing contest. Some of the more frequent odds quoted were: Chicago White Sox-Cleveland, pick em; Boston 7/8; Detroit 5½ to 6½; Los Angeles 6½ to 7½; Milwaukee 6/7; Valdez-DeJohn, 6 to 5 and pick or even 7 DeJohn; 8½ to 10 don't go; Pierce-Score, pick; Brewer 45/55 over Brown; Kucks 70/80 over Stobbs; Foytack 10/20 over Maas; Gomez 10/20 over Jones; and Burdette 25/35 over Lawrence. Some of the wagers which were accepted are: $1,000.00 on Brewer; $600.00 on Burdette; a round robin for $30.00 on White Sox, Red Sox and San Francisco; a bet on don't go; $500.00 on Yankees; $25.00 on Burdette; $240.00 to $200.00 on Valdez; and $1,200.00 on Valdez. Overheard also was the acceptance of a $5.00 bet on the number 121. Shortly after this wager was accepted, a male voice in conversation over the telephone was heard to say "One of your customers called to play $5.00 on 121—Joe B. That's OK, I know him." A long distance call was placed to Cincinnati in which it was stated that they were available any time to accept bets and gave the number DIstrict 7-3554 to be called. The male voice in this conversation further continued to state that they did not accept horse bets, only bets on sporting events and fights. At about 12:30 p.m. a conversation was overheard concerning a $5,000.00 bet on Detroit over Kansas City at 8/5. John Does #1 and 2 discussed their reluctance to hold this bet without an OK from "Julius". Several phone calls were then made in an effort to locate "Julius". During the latter part of the observations on this date a conversation was overheard between the two men within premises 408 - 21st

Street, northwest, comparing and totaling bets which each one had recorded. John Doe # 1 and John Doe # 2 were within the premises continuously during the period of observation with the exception that at 2:05 p.m. John Doe # 1 departed for ten minutes and when he returned he was observed to be carrying two paper bags which appeared to contain food.

On April 24, 1958, at about 10:50 a.m., Agents Jewell and Bedingfield observed John Doe # 1 and John Doe # 2 enter the premises 408 - 21st Street, northwest, Washington, D. C. At about 11:15 a.m., Julius Silverman was observed entering these premises. From 10:50 a.m. until 3:05 p.m., Agents Bedingfield and Jewell were able to overhear numerous conversations by three male voices relating to gambling activities, such as the quoting of odds and accepting of wagers on baseball games, taking place within the premises 408 - 21st Street, northwest, Washington, D. C. Some of the more frequent odds quoted were: Detroit-Kansas City, pick em; Chicago White Sox 5½ to 6½; New York 8½ to 9½ which was later quoted as "rained out"; Boston 7 to 8; St. Louis 5½ to 6½; Milwaukee 6½ to 7½; Philadelphia 5½ to 6½; Los Angeles 7 to 8; Urban 5 to 15 over Shaw; Wilson 10 to 20 over Tomanek; Ford 70 to 85 over Ramos; Fornieles 45 to 55 over Pappas; Mizell 10 to 20 over Burnside; Spahn 30 to 40 over Lawrence; Simmon 10 to 20 over Friend; and McDevitt 50 to 60 over Hillman or Brosman. Some of the wagers which were accepted are: $50.00 on Pappas with the quotation "OK Mr. Phillips, you have yourself a bet"; a bet on Urban over Shaw with the statement that if Urban doesn't go the bet is off; $300.00 on Baltimore; $700.00 to $800.00 on the Red Sox; Baltimore and White Sox parlay for $1,500.00; and $50.00 on the Chicago Cubs. At about 2:20 p.m., Julius Silverman was observed leaving the premises

408 - 21st Street, northwest, Washington, D. C., and at about 2:28 p.m. John Doe # 2 was observed leaving the premises; however a male voice could be overheard continuing to quote odds and accept bets after Silverman and John Doe # 2 left this premises. Observation was discontinued at 3:05 p.m.

At about 10:51 a.m., Friday, April 25, 1958, Agents Bedingfield and Jewell and Det. Stone observed John Does # 1 and # 2 enter premises 408 - 21st Street, northwest. At about 2:40 p.m., same date, Agents Bedingfield and Jewell observed John Doe # 2 leave premises 408 - 21st Street, northwest, and ride away in a taxicab. Observations discontinued.

At about 11:00 a.m., Tuesday, April 29, 1958, Agents Bedingfield and Jewell observed John Doe # 1 enter premises 408 - 21st Street, northwest. Between 2:25 p.m. and 2:55 p.m., same date, Agent Jewell overheard two male voices within premises 408 - 21st Street, northwest, engaged in telephone conversations in which they gave a rundown on the betting odds on different baseball games being played on that date. At about 8:35 p.m., same date, Agents Bedingfield observed John Does # 1 and # 2 leave premises 408 - 21st Street, northwest, and depart the area. Observations discontinued.

From the evidence related herein, as well as other information in the possession of the investigating officers, they are positive that premises 408 - 21st Street, northwest, Washington, D. C., is being used by Julius Silverman and John Does # 1 and # 2 to conduct a gambling operation on sporting events in violation of the gambling statutes of the District of Columbia, and that there is presently secreted within these premises records, papers, memoranda and other gambling paraphernalia relating to

the gambling operation as reflected in this affidavit in violation of the gambling laws of the District of Columbia.

ARNOLD G. BEDINGFIELD
Arnold G. Bedingfield,
Special Agent,
Internal Revenue Service

WILLIAM H. JEWELL
William H. Jewell,
Special Agent,
Internal Revenue Service

JESSE R. STONE
Jesse R. Stone,
Probational Detective,
MPDC, Morals Division

Subscribed and sworn to before me this
30th day of April, 1958.

JAMES F. SPLAIN
James F. Splain,
U. S. Commissioner for the District of Columbia.

Filed January 15th, 1959

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1135-58

UNITED STATES OF AMERICA

v.

JULIUS SILVERMAN, ROBERT L. MARTIN, MEYER SCHWARTZ

Order

This matter came on for consideration on defendants' motion for return and suppression of evidence.

The defendants were reindicted because of a technical discrepancy in the indictment initiating Criminal Case No. 730-58. It appears that the issues of law and the fact situation involved in the instant motion were precisely the same as those presented in the motion in Criminal Case No. 730-58 argued before Judge Holtzoff. Since Judge Holtzoff gave full consideration and filed an extensive memorandum (see 166 F. Supp. 838 Oct. 24, 1958) denying that motion, this Court will not rehear the matter. It is, therefore, this 15th day of January, 1959, by the Court,

ORDERED That the motion be, and the same is hereby, denied.

/s/ LUTHER W. YOUNGDAHL
Judge

Filed November 10, 1958

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 730-58

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JULIUS SILVERMAN, ROBERT L. MARTIN, and MEYER SCHWARTZ, *Defendants*.

Opinion

Oliver Gasch, United States Attorney; and Thomas A. Flannery, Assistant United States Attorney; both of Washington, D. C., for the plaintiff.

Edward Bennett Williams and Myron G. Ehrlich, both of Washington, D. C., for the defendants.

The defendants are under indictment for violations of the gambling statutes of the District of Columbia. The matter is before the Court at this time on the defendants' motion to suppress certain evidence obtained by police officers as a result of a search and seizure in connection with this case. This search and seizure was admittedly made pursuant to a search warrant.

The basis of the motion is two-fold: first, that the affidavit on the basis of which the search warrant was issued, was insufficient, in that the information set forth therein was obtained in violation of the Constitution and the Laws of the United States; second, that the search warrant was unlawfully executed.

Taking up these two grounds separately, the manner in which the facts set forth in the affidavit which led to the issuance of the search warrant, were secured is not in dispute. By permission of the owner police officers obtained

entrance to a portion of the premises which adjoined the searched premises and attached an electronic device to the inside wall of the adjoining premises with a wire projecting about six or eight inches into the party wall between the two houses. By means of this electronic device, the officers were able to overhear conversations that went on in the suspected premises. These conversations were made the basis of the affidavit in question. It is urged that the action of the police officers was violative of the Fourth Amendment, as well as of the statute relating to interception of communications. Each of these two grounds will be separately considered.

The provisions of the Fourth Amendment relating to search and seizure are limited to physical searches and seizures of objects. This has been continuously held by the Supreme Court. Thus, in *Olmstead* v. *United States*, 277 U.S. 438, 464, the Court laid down the general proposition that, if evidence is obtained by the use of sense of hearing and that only, and there is no entry into the house or office of the defendant, there is no unlawful search and seizure. The *Olmstead* case applied this principle to what is known as wire tapping, that is, physically connecting a telephone instrument with wires, over which telephone messages are carried. It was held that such an activity is not a violation of the Fourth Amendment. The *Olmstead* case is law today.

It was followed in the case of *Goldman* v. *United States*, 316 U.S. 129, 135, where the general principle was applied to a situation in which, as in this case, an electronic instrument was attached to a wall in adjacent premises and by this means conversations going on within the suspected premises were overheard. It was held that this did not constitute a violation of the Fourth Amendment. The *Olmstead* case was cited with approval in *On Lee* v. *United States*, 343 U.S. 747, 751.

In determining what principles of law have been enunciated in judicial opinions, it is, of course, well settled that consideration must not be given to everything that was said, but only to what was actually held. The ruling of a Court must be determined by reference to the factual situation. Everything else is dicta and not binding. This was emphatically indicated by Chief Justice Marshall many years ago in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, 399. It would not do, as counsel suggests, for the Court to speculate on what at some future time the Supreme Court might decide in the light of changes of personnel, and in the light of various remarks of individual members of the Court in different cases. This exercise might be interesting for the author of an article in a legal periodical, but it would be inappropriate for a Court in deciding actual controversies. Such speculation might perhaps lead to a chaotic situation, since different Judges might reach different results by this means. This Court is bound to follow the rules of law as formulated by the Supreme Court, as they now stand.

The rules of law governing the interpretation of the provisions of the Fourth Amendment relating to search and seizure are derived from the philosophy and the history of that Amendment. In the mass of decisions, some of them dealing with finespun distinctions, that have come from numerous Courts in recent years on the law of search and seizure, we are likely to lose sight of the forest for the trees. Sometimes, the real purpose of the Founding Fathers is lost sight of. The history of the Fourth Amendment shows that it was based on the famous decision of Lord Camden, as well as the experience of the colonies in connection with writs of assistance and was intended to bar exploratory domiciliary searches that were obviously oppressive and savored of tyranny. It was not intended to lead to minor distinctions between various types of searches and seizures, and place some on one side of the line and some on the other.

Be that as it may, however, the state of the law today, so far as Supreme Court decisions are concerned, is that the constitutional limitations on searches and seizures do not apply to conversations and are confined to physical invasion and to the seizure of physical objects. The Fourth Amendment does not ban eavesdropping. For example, it is no violation of the Fourth Amendment for a law enforcement officer to crouch underneath an open window and overhear a conversation going on inside. Stratagem and artifice in the detection of crime and apprehension of criminals is neither illegal nor unethical. In fact, the use of surreptitious means to that end is indispensable in cases of certain types. It is only if the law enforcement officer oversteps express rules of law that he acts illegally. In fact he may obtain evidence by trespass, *Hester* v. *United States*, 265 U.S. 57, 58. In pursuing suspects he may ignore traffic regulations.

The Court is, therefore, of the opinion that there is no violation in this case of the provisions of the Fourth Amendment.

This brings us to a discussion of the second objection; namely, that there was a violation of the statute banning wire tapping, 47 U.S.C. § 605, which relates to intereception of messages of certain types. That statute has been limited to physical interception and does not extend to intereception by an electronic instrument, if there is no contact between that instrument and the means of communication.

This was also held in *Goldman* v. *United States*, 316 U.S. 129, 133. It is urged that there is a distinction between the instant case and the *Goldman* case in that in the instant case, a wire projected from the electronic instrument for a short distance into the party wall; instead of as in the *Goldman* case, being entirely attached to the inside wall.

De minimis non curat lex. It would be, in the opinion of the Court, almost ludicrous to draw a line of distinction between legality and illegality on such minute circumstances. Moreover, the Court does not feel that inserting a wire into a party wall actually constitutes a trespass.

In view of these considerations, the Court holds that the affidavit on which the warrant was issued, is not based on information obtained by any violation of either Constitutional or statutory rights and, therefore, this basis of the motion is not well-founded.

The second basis of the motion relates to the manner of the execution of the warrant. It is complained that in this case, the officers armed with the search warrant entered the premises referred to therein, without identifying themselves to the occupants or announcing their purpose. It is the law that an officer may not break into a building for the purpose of executing a warrant, unless he first demands admission after identifying himself and announcing his mission. This was held very recently by the Supreme Court in the case of *Miller* v. *United States*, 357 U.S. 301. It must be observed, however, that this ruling is limited to a situation in which the officers broke into the premises by force. The statute governing such matters, likewise is limited to such a situation. In this instance, however, the testimony shows that the officers did not use any force and did not break into the premises. The objection is, therefore, not well taken.

In the light of these considerations, the motion is denied.

ALEXANDER HOLTZOFF
United States District Judge.

October 24, 1958.

Filed March 16, 1959

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Criminal No. 730-58

UNITED STATES OF AMERICA

v.

JULIUS SILVERMAN, ROBERT L. MARTIN, MEYER SCHWARTZ,
Defendants

Affidavit

DISTRICT OF COLUMBIA, ss:

Julius Silverman, Robert L. Martin, and Meyer Schwartz of Washington, D. C., defendants in the above-captioned case, being duly sworn, upon their oaths depose and say:

1. During the period from April 21, 1958 through April 30, 1958, Robert L. Martin was the lessee of those premises located at 408 21st Street, N. W., Washington, D. C., having possession of said premises by virtue of a lease executed by Woodward and Norris Realty Co., 723 20th Street, N. W., Washington, D. C., as agents for the owners of said premises.

2. During the aforesaid period Julius Silverman and Meyer Schwartz shared occupancy and exclusive right to

possession of the premises with Martin pursuant to an oral understanding with Martin as lessee.

/s/ JULIUS SILVERMAN
Julius Silverman

/s/ ROBERT L. MARTIN
Robert L. Martin

/s/ MEYER SCHWARTZ
Meyer Schwartz

Subscribed and sworn to before me this 24th day of October, 1958.

/s/ GERALDYNE H. WAGNER
Notary Public, D. C.

Filed March 24, 1959

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1135-58

Charge: Violation D. C. Gambling Laws, Failure to Pay Federal Gambling Tax

UNITED STATES

v.

1. JULIUS SILVERMAN
2. ROBERT L. MARTIN
3. MEYER SCHWARTZ
Defendant

On this 24th day of March, 1959, came again the parties aforesaid, in the manner as aforesaid, and the same jury

as aforesaid in this cause, the hearing of which was respited yesterday; whereupon, after hearing the arguments of counsel and the instructions of the Court, the alternate jurors are discharged and the jury retires to deliberate; whereupon, the said jury upon their oath say that each defendant is guilty as charged in counts one, two, and three and not guilty on counts four and five; thereupon, each and every juror is asked to state his individual verdict and each and every juror says that each defendant is guilty as charged in counts one, two and three and not guilty on counts four and five.

By direction of

JOSEPH ~~R.~~ JACKSON
Presiding Judge
Criminal Court = Six

HARRY M. HULL, *Clerk*

By /s/ CHARLES D. ATCHISSON
Deputy Clerk

Present:

United States Attorney

By THOMAS FLANNERY
Assistant United States Attorney

THOMAS DORAN
Official Reporter

Filed April 3, 1959

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Criminal No. 1135-58

UNITED STATES OF AMERICA

v.

JULIUS SILVERMAN, ROBERT L. MARTIN, MEYER SCHWARTZ,
Defendants

Motion for Judgment of Acquittal Notwithstanding the Verdict or for a New Trial

Defendants move the court to enter a judgment of acquittal notwithstanding the verdict or, in the alternative, to grant them a new trial for the following reasons:

1. The government's evidence was secured in violation of their rights under the Fourth Amendment and § 605 of the Federal Communications Act, 47 U.S.C. § 605.

2. The court erred in denying defendants' motion for a judgment of acquittal under count 2 and in charging the jury that defendants could be guilty of maintaining a gaming table regardless of whether the persons making bets or wagers were physically present.

3. For such other and further reasons as may be advanced at the oral hearing on this motion.

Defendants further move the court to grant them a new trial on the ground that the verdict is so inconsistent that the interests of justice require a new trial.

/s/ Edward Bennett Williams
Counsel for Defendant Silverman

/s/ Thomas A. Wadden, Jr.
Counsel for Defendants
Martin and Schwartz
1000 Hill Building
Washington 6, D. C.

A copy of the foregoing motion has been mailed, first class postage prepaid, this 3rd day of April, 1959, to Thomas A. Flannery, Assistant United States Attorney, United States Court House, Third Street and Constitution Avenue, N. W., Washington, D. C.

/s/ E. B. W.

Filed April 17, 1959

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 1135-58

Charge Gambling

UNITED STATES

v.

1. Julius Silverman
2. Robert L. Martin
3. Meyer Schwartz

Defendant

On this 17th day of April, 1959, came the attorney of the United States and the Defendants by counsel, Thomas Wadden, Esquire; whereupon, the motion of the defend-

ants for a judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial coming on to be heard, after argument of counsel is by the Court denied.

By direction of

JOSEPH R. JACKSON
Presiding Judge
Criminal Court #6

HARRY M. HULL, *Clerk*
By /s/ CHARLES D. ATCHISSON
Deputy Clerk

Present:
United States Attorney
By THOMAS FLANNERY
Assistant United States Attorney

BARBARA WILLIAMSON
Official Reporter

Judgment and Commitment and Fine (Rev. 7-52)

Filed June 1, 1959

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1135-58

UNITED STATES OF AMERICA

v.

1. JULIUS SILVERMAN

On this 29th day of May, 1959 came the attorney for the government and the defendant appeared in person and[1] by counsel, Edward Bennett Williams, Esquire

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty,"

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of Violation Title 22, District of Columbia Code, Sections 1502, 1504 & 1505 as charged[3] in counts one, two and three and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Nine (9) months and pay a fine of Five hundred dollars ($500.00) on count one;

Twenty (20) months to Five (5) years on count two;

Nine (9) months and pay a fine of Five hundred dollars ($500.00) on count three, said sentence to run by the counts concurrently

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOSEPH R. JACKSON
United States District Judge.

....., Clerk.

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or (4) "nolo contendere," as the case may be. [3] Insert: "in count(s) number ....." if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

Judgment and Commitment and Fine (Rev. 7-52)

Filed June 1, 1959

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1135-58

UNITED STATES OF AMERICA

v.

2. ROBERT L. MARTIN

On this 29th day of May, 1959 came the attorney for the government and the defendant appeared in person and[1] by counsel, Thomas Wadden, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of Violation Title 22, District of Columbia Code, Sections 1502, 1504 & 1505 as charged[3] in counts one, two and three and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Nine (9)

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number _____" if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

months and pay a fine of Five hundred dollars ($500.00) on count one;

Twenty (20) months to Five (5) years on count two;

Nine (9) months and pay a fine of Five hundred dollars ($500.00) on count three, said sentence to run by the counts concurrently

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOSEPH R. JACKSON
United States District Judge.

....., *Clerk.*

Judgment and Commitment and Fine (Rev. 7-52)

Filed June 1, 1959

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1135-58

UNITED STATES OF AMERICA

vs

3. MEYER SCHWARTZ

On this 29th day of May, 1959 came the attorney for the government and the defendant appeared in person and[1] by counsel, Thomas Wadden, Esquire.

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number ....." if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecu-

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of Violation Title 22, District of Columbia Code, Sections 1502, 1504 & 1505 as charged[3] in counts one, two and three and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Nine (9) months and pay a fine of Five hundred dollars ($500.00) on count one;

Twenty (20) months to Five (5) years on count two;

Nine (9) months and pay a fine of Five hundred dollars ($500.00) on count three, said sentence to run by the counts concurrently

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOSEPH R. JACKSON
United States District Judge.

.....,
Clerk.

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tively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

Filed June 3, 1959

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 1135-58

UNITED STATES OF AMERICA

v.

JULIUS SILVERMAN, et al.

Notice of Appeal

Name and address of appellant:
Julius Silverman
2756 Stephenson Lane, N. W.
Washington, D. C.

Name and address of appellant's attorney:
Edward Bennett Williams
1000 Hill Bldg., Washington, D. C.

Offense: Violation Title 22 District of Columbia Code, Sections 1502, 1504, and 1505

Concise statement of judgment or order, giving date, and any sentence:
Judgment, dated May 29, 1959, found appellant convicted on three counts. Appellant was sentenced as follows:

Nine (9) months and a fine of $500 on count one;
Twenty (20) months to 5 years on count two;
Nine (9) months and a fine of $500 on count three;

Said sentence to run by the counts concurrently.
Name of institution where now confined, if not on bail—

On bail pending appeal

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date
June 3, 1959

Appellant

/s/ EDWARD BENNETT WILLIAMS
Attorney for Appellant.

Filed June 3, 1959

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 1135-58

UNITED STATES OF AMERICA

v.

JULIUS SILVERMAN, et al.

Notice of Appeal

Name and address of appellant:
Robert L. Martin
1225 13th Street, N. W.
Washington, D. C.

Name and address of appellant's attorney:
Edward Bennett Williams
1000 Hill Bldg., Washington, D. C.

Offense: Violation Title 22 District of Columbia Code, Sections 1502, 1504, and 1505

Concise statement of judgment or order, giving date, and any sentence:

Judgment, dated May 29, 1959, found appellant convicted on three counts. Appellant was sentenced as follows:

Nine (9) months and a fine of $500 on count one;
Twenty (20) months to 5 years on count two;
Nine (9) months and a fine of $500 on count three;

Said sentence to run by the counts concurrently.
Name of institution where now confined, if not on bail—

On bail pending appeal

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date
June 3, 1959

Appellant

/s/ Edward Bennett Williams
Attorney for Appellant.

Filed June 3, 1959

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 1135-58

United States of America

v.

Julius Silverman, et al.

Notice of Appeal

Name and address of appellant:
Meyer Schwartz
1225 13th Street, N. W.
Washington, D. C.

Name and address of appellant's attorney:
Edward Bennett Williams
1000 Hill Bldg., Washington, D. C.

Offense: Violation Title 22 District of Columbia Code, Sections 1502, 1504, and 1505

Concise statement of judgment or order, giving date, and any sentence:
Judgment, dated May 29, 1959, found appellant convicted on three counts. Appellant was sentenced as follows:

Nine (9) months and a fine of $500 on count one;
Twenty (20) months to 5 years on count two;
Nine (9) months and a fine of $500 on count three;

Said sentence to run by the counts concurrently.
Name of institution where now confined, if not on bail—

On bail pending appeal

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date
June 3, 1959

Appellant

/s/ Edward Bennett Williams
Attorney for Appellant.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 730-58

UNITED STATES OF AMERICA

vs.

JULIUS SILVERMAN, ROBERT L. MARTIN, MEYER SCHWARTZ.

Washington, D. C.
October 24, 1958

The above-entitled matter came on for hearing before The HONORABLE ALEXANDER HOLTZOFF, a United States District Judge, at 10:00 a.m.

Appearances:

For the Government:

THOMAS A. FLANNERY, ESQ.

For the Defendants:

EDWARD BENNETT WILLIAMS, ESQ.,
MYRON G. EHRLICH, ESQ.

. . . . . .

2 Mr. Williams: May it please the Court, this is a motion filed under Rule 41e of the Federal Rules of Criminal Procedure, looking towards the return and suppression of evidence.

. . . . . .

3 Mr. Williams: The grounds are these, your Honor, that all of the facts contained in the affidavit which was predicated for the issuance of the search warrant, were gained by use of an electronic device em-

ployed. The electronic device consisted of an antenna, a microphone and ear phones, and it is our intention to prove, if the Court please, that there was an insertion between the premises of 410-21st Street and 408-21st Street, of a device at the baseboard of the party wall which brought forth the sound from 408-21st Street to 410-21st Street, where they were heard by the affiants, and these facts constituted all of the facts which are contained in the affidavit executed on April 30, 1958, for which the search warrant was issued.

The Court: Now, does the Government admit these facts?

Mr. Flannery: Your Honor, the facts are these. Mr. Williams' clients were located and conducting their gambling business at 408-21st Street. The house next door was vacant, 410-21st Street. Inspector Layton of the Gambling Squad secured the permission of real estate people who had the title to 410, the adjacent
4 house, to have his officers go into the vacant house and make observations and having got permission the officers did that, and they did use a so-called electronic device. They had a small antenna on it; they slipped it under the baseboard of the premises 410, where they had permission to be, and were able to hear the defendants transacting their illegal activities from the premises next door.

It is the Government's position, of course, that there is no violation of Federal Communications Law and I am sure, your Honor is familiar with the *Goldman* case in the Supreme Court, and your Honor's own opinion in the *Sullivan* case.

The Court: Well, then, the facts are not in dispute, are they? Is there any dispute as to any detail of the facts?

Mr. Flannery: That is my version of the facts. I don't know whether Mr. Williams will agree with me.

Mr. Williams: I think there is no dispute, your Honor.

The Court: Very well then. It comes down to a question of Law, does it not?

Mr. Williams: Yes; I think so.

The Court: Very well.

. . . . . .

15 Mr. Williams: In this case, your Honor, there was a trespass in this way; there was an insertion of an instrument through the baseboard, through a party wall, your Honor, and strangely enough, the Law of party wall becomes very important in this matter—through a party wall to the next house to pick up the sound. So, that, there was a trespass in this jurisdiction and under the cited case; the owners
16 of a party wall are taken in common with easement for support running from the other. In many, many jurisdictions, including the jurisdiction in which the *Goldman* case was decided, but that wasn't a party wall; yet a different view of party wall is taken, they are taken by severaltys.

The Court: I think you are right. Adjoining owners of party wall are tenants in common, have party wall. Therefore, neither one is trespassing when he enters upon the party wall, because a tenant in common can not, if I recall my Law of Real Property correctly, can not be guilty of trespass.

Mr. Williams: Your Honor, our Court of Appeals many years ago had this very question before it and it was decided where a member and owner of a party wall had a window, his wall was over across the line and, therefore, it became a party wall for this neighbor's building and the question was, could he keep his window since he was taken in common wall, and the Court of Appeals said, "No" he had to remove his window because the easement was for a short time only. And here, your Honor, regardless of whether they have a party wall, there was a large intrusion and penetration into

the wall of a house and into the room wherein the conversations were taking place.

The Court: I did not understand that to be the fact; is it stipulated?

17 Mr. Flannery: No, I didn't stipulate that at all.

Mr. Williams: It went through the baseboard.

Mr. Flannery: There was no intrusion into the premises of next door.

The Court: That is what I understood to be the fact.

Mr. Williams: Well, if there was insertion into the party wall, your Honor, I think that of necessity there was an intrusion.

The Court: Well, that is an inference, but the fact is that the intrusion did not go beyond the party wall. Is that correct?

Mr. Flannery: It went in about a distance of about six inches from the premises where they had a right to be and there was no intrusion.

The Court: Into the party wall?

Mr. Flannery: Into the party wall, but no intrusion into the premises.

The Court: But there was an intrusion into the party wall?

Mr. Flannery: Yes.

Mr. Williams: May I ask counsel because this may one day become important in this case, if we could find out how long the inserted needle actually was, or

18 if we could get a stipulation from counsel.

The Court: Yes. Actually, I think, as a matter of principle, I don't think it makes any difference whether it was one inch or foot, so long as it did not intrude beyond the party wall. The applicable principle is the same irrespective of the distance of intrusion into the party wall.

Very well.

Mr. Williams: I take it counsel doesn't have that information in any event?

Mr. Flannery: I know how long the spike was; it was twelve inches long and it went in approximately six to seven inches; about half-way.

Mr. Williams: Your Honor, it is our position that the insertion of this spike or needle, whatever it may be called, did, in fact, constitute a trespass; that the party wall was never designed nor was there ever any understanding between the parties in law or fact, that the wall could be used as a medium through which the sound being transmitted on one side could be carried over to the other side, and I submit, if the Court please, that if a spike can be inserted into a wall for six inches or seven inches in a one-foot wall, I think, Your Honor, that there can be no confidentiality of communication in any house because this could be done in a tenement wall which subdivides the occupants.

. . . . . .

Mr. Flannery: Now, with regard to the other contention in this case, your Honor, that the Federal Communications Act was violated. . . .

. . . . . .

. . . my view on that would be, your Honor, that since the officers were in the adjacent premises with the permission of the owner, that he had a perfect right, since they had permission of the owner to use the party wall for the purposes for which they used it. There is no trespass in this case into the premises of the defendants, and I think, their conduct therefore was perfectly proper and there was no trespass.

The Court: Mr. Williams' point is that he did not use these words, but I gather that was the thought; that neither owner of a party wall has a right to grant a license to anyone to use the party wall for any other purpose than that for which it was intended as a party wall. What do you say about that?

Mr. Flannery: I would differ with him on that. I say that either party would have a use to the wall and in

this case, the use of the little antenna that was inserted for a short distance into the wall would be an entirely legal matter. I say there was no trespass and I would go so far as to say even had there been a trespass,
34 I know of no case which would therefore render conversations heard as a result of the trespass inadmissible in evidence.

. . . . . .

38 Mr. Williams: Your Honor addressed a question to Mr. Flannery during his argument and I would like to speak to that for just one moment.

The question of a party wall and the effect that a party wall has in this particular case. Your Honor, I think the Courts are pretty uniformly held that party walls like, unilateral walls fill five functions. The difference between a party wall and unilateral wall is that the party wall fills the function mutually for continguous
39 neighbors; the function being security against intrusion by strangers, support to the building and protection from sound and sight.

Now, your Honor, the courts have held that beyond using the wall for those purposes, a use may not be made of a party wall by one of the contiguous neighbors where such use would be detrimental to the other and the detrimental use would be a trespass. Specifically, your Honor, I would like to call your attention to a case wherein this problem is treated almost in a situation exactly as the case at bar, Spring Realty Corp. v. Ryan, which was decided in 1954, in the Appellate Division of the Supreme Court in New York, and in that case, there was a party wall and one of the contiguous neighbors sought to put an air conditioning unit against the wall and he put steel beam or steel pins in the wall to support the unit, and the Court in discussing whether or not there was a trespass there, held that while there was a trespass, the basic rule that obtained with respect to a party wall and the use of it between the contiguous neighbors, is this: "Party

wall is a structure for the common benefit and convenience of the continuous user and either party is restricted to such use as shall not be detrimental to the other."

So, your Honor, I submit to you if one of the neighbors had driven a peepshole through the wall, that would certainly be a use detrimental to the other, or likewise, if one of them used a microphone, by driving a spike into the wall to transmit the sound from his neighbor's house or apartment, likewise, that would be a use of the party wall and not contemplated by the other party and detrimental to it. For this reason, I think, there is a trespass in this case.

The Court: Mr. Williams, do you predicate your position on the Fourth Amendment or on the statute known as the wire tapping statute, Title 47 of the United States Code, Section 605?

. . . . . .

Mr. Williams: Yes, sir.

The Court: Both the Fourth Amendment and the wire tapping statute?

Mr. Williams: Yes, while there was not a technical interception, your Honor, there was the transmission of one end of the conversation without the consent of either party.

. . . . . .

The above-entitled cause came on for trial in the United States District Court for the District of Columbia at ten o'clock, a.m., on Monday, March 16, 1959,

Before:

HONORABLE JOSEPH R. JACKSON, *Judge*, there being the following

Appearances:

THOMAS A. FLANNERY, ESQUIRE, on behalf of the Government;

EDWARD BENNETT WILLIAMS, ESQ., on behalf of the defendant, Julius Silverman,

THOMAS WADDEN, ESQ., on behalf of the defendants, Robert L. Martin and Meyer Schwartz.

* * * * * * * * * * *

8 (At the Bench:)

Mr. Williams: Your Honor, we have a legal matter that I think it is appropriate to take up at this time, inasmuch as there isn't any dispute here between the Government and the defense concerning the facts with respect to how the evidence in this case was secured; and I would like the opportunity to argue that legal matter now outside of the presence of the jury.

The Court: You may. You are prepared to argue it, assume?

Mr. Flannery: Oh, yes. I might say—of course, counsel has a right to renew all previous motions, but I wish to point out to the Court that their motion to suppress evidence filed under—the case was under a different number, but the same issues—Judge Holtzoff heard it, and it was reported in the Federal Supplement—

The Court: Wasn't he reversed?

Mr. Flannery: No.

Mr. Williams: I think Judge Holtzoff's decision has been reversed by the case of *Williams* against the *United States*, your Honor, which was decided the 29th day of January.

* * * * * * * * * * *

10 Mr. Flannery: Your Honor, it is my view, and my view is buttressed by the decisions I have, that when there is a preliminary motion to suppress evidence, and a Judge has ruled on that motion, it becomes the law of the case.

The Court: The same motion that is before me now?

Mr. Flannery: The same motion that is before you now,

with the added feature, that I understand counsel now claims that a recent case, the case of *Harry Williams* versus the *United States*—

The Court: Subsequent to Judge Youngdahl's order.

Mr. Flannery: Yes, changes the situation.

Now, I think he should confine his argument at this time to the Harry Williams case, and not rehash all the matter that we went through before Judge Holtzoff.

I have glanced through this eighteen page memorandum, and for the most part, it's a rehash of the same points which were before Judge Holtzoff, and which he ruled on adversely to the defendants.

So, in the interest of saving time, it would appear to me that the common sense way to handle this thing would be to hear counsel's remarks as to the Harry Williams case, and, according to him, how it pertains to this case.

The Court: The Williams case?

Mr. Flannery: The Harry Williams case, a recent decision, I believe, that counsel is relying on. I don't think, however, now he should go into everything—

The Court: You mean a decision of the Court of Appeals?

Mr. Flannery: A decision of the Court of Appeals that I understand counsel thinks has some bearing on this case.

The Court: You think it should be confined to that?

Mr. Flannery: I do; because the law of the case has been decided by Judge Holtzoff, and there's no point in rehashing everything that Judge Holtzoff has already ruled on.

The Court: I wouldn't care to have any complete rehashing of the whole thing.

Mr. Williams: Your Honor, I would have to differ with Mr. Flannery.

Judge Holtzoff, I submit, your Honor, did not rule on the matter we are now presenting to your Honor.

The Court: In what phases?

Mr. Williams: I call to your Honor's attention the record of that argument, page 41, wherein Judge Holtzoff said—that was a motion, your Honor, based upon the fact that the search warrant was defective, because it had been predicated upon incompetent evidence.

Judge Holtzoff said—

The Court: What incompetent evidence?

Mr. Williams: The incompetent evidence, your Honor, being evidence that was seized, we contended, in violation of the right of the defendants under the Fourth Amendment.

The Court: It had a listening device in it?

Mr. Williams: Yes, sir. Yes, sir.

The Court: That was a trespass, wasn't it?

Mr. Williams: Yes, sir.

The Court: Wasn't it that Judge Holtzoff ruled as a matter of law that it was not a trespass—that was the finding in this case?

Mr. Williams: Your Honor,—

Mr. Flannery: I know, but I say that's your contention here.

Mr. Williams: That's my contention, yes.

The Court: A trespass here and a trespass there.

Mr. Williams: You see, Judge Holtzoff said:

(Reading) —Bear in mind we are dealing not with the admissibility of evidence at the trial, but with the sufficiency of the affidavit in support of the search warrant.

Bearing in mind, further, that it has been held that incompetent evidence may be used in an affidavit when the warrant is issued, and then he said, your Honor:

You see, the question is a little different than the admissibility of evidence in a trial, is it not?

And Mr. Flannery said, "Yes."

Judge Holtzoff specifically said, your Honor, that he was not ruling on the admissibility of all of this evidence at

the trial. He specifically said this at page 41 of the record.

Mr. Flannery recognized at that time the distinction between the argument made before trial, which was wholly related to the search warrant, and the argument that would be made at trial on the admissibility of the evidence.

So I submit to your Honor that Judge Holtzoff did not rule on the thing that we are now presenting to your Honor, and I would like to have the opportunity, if the Court please, to argue this fu v, because I feel that it's an important point. I don't want to trespass on your Honor's patience.

The Court: I'm just wondering how you are going to get by that Goldman case. There's been no pronouncement by the Supreme Court, and I don't know that anybody has any particular right to say that it's changed until it goes up there again. It's still the law.

Mr. Williams: The Goldman case, your Honor, I believe, has been reversed by the Supreme Court by indirection.

14 The Court: I'm not going to take any indirection. I read your brief on that.

I think the Goldman case is still the law. Do you?

Mr. Flannery: I do; and Judge Holtzoff does, too.

Mr. Williams: Of course, I think the Goldman case doesn't control here, your Honor, because I think our facts are greatly different from the Goldman case, in that here, we have a trespass—

The Court: Well, wasn't permission given by—as much an owner under the law—as the house next door?

Mr. Williams: Yes, your Honor.

The Court: That did not appear in the Goldman case. Therefore, I would think that this case is stronger.

Mr. Williams: Well, of course, your Honor, the converse of that must be true. This wall was owned—

The Court: A party wall, wasn't it?

Mr. Williams: By both parties. And each party has the right to use it for purposes of enclosure and for pur-

poses of support, but neither party has a right to abuse the use of the wall, and there is decisional law, if the Court please, that to insert any form of object into a party wall is a trespass, and we contend there was a trespass here.

Beyond this, if the Court please—

The Court: Trespass against whom?

Mr. Williams: Against the person who is the other party to the ownership to the wall.

The Court: They had to get permission of both owners, is that it?

Mr. Williams: Yes, sir.

The Court: According to you?

Mr. Williams: Yes, sir.

Mr. Flannery: Your Honor—

The Court: Just a moment.

Mr. Williams: Your Honor, the other point is this: That Judge Holtzoff pitched his decision upon this fact, and it's very clear here, your Honor, and his reasoning—he said:

The provisions of the Fourth Amendment relating to search and seizure are limited to physical searches and seizures of objects.

Now, the Court of Appeals—and I am prepared to show you, your Honor, that there's a line of cases that buttress the Court of Appeals in its decision in the Williams case, but the Court of Appeals expressly held, only on January 29, in the case of Harry Williams against the United States of America, as follows:

The Court refused to suppress the evidence apparently on the ground that it was obtained visually and not physically seized.

. . . . . .

For that reason, your Honor, I think, and I most respectfully ask that your Honor give us a hearing in this matter, because—

The Court: Aren't you arguing it now?

Mr. Williams: Yes, we most certainly are.
I'd like to be able to argue it—
The Court: I think the crux of it is right there.
Mr. Williams: Right—
The Court: On the unlawfulness of having this hearing.
Mr. Williams: Yes, sir; I do, too.
The Court: Because it is a trespass. I think the whole thing hinges on that.
Mr. Williams: Yes, sir. You see in the Goldman case—
The Court: That's what I want to see—how you're going to get away from the Goldman case.
Mr. Williams: You see, in the Goldman case, your Honor, as you know, they simply took a detective form and placed it up against the side of a wall.
There was no penetration of the wall, as there is in this case.
Now, in this jurisdiction, if the Court please, contrary to the other all of the other jurisdictions in the nation in so far as we've been able to find—we have a different rule on party walls.
I'd like to just address your Honor's attention to that for one moment.

. . . . . .

The Court: I assume you had the same contention before Judge Holtzoff you are giving me now?
Mr. Williams: I didn't have the benefit of the Williams case at that time, your Honor.
The Court: I know you didn't, but you had everything up to the reversal of the William case?
Mr. Williams: I argued this, your Honor, very fully before Judge Holtzoff, and I urged upon him all of the points that I'm urging upon you now.
I could not persuade Judge Holtzoff, if the Court please, that the Fourth Amendment is construed by the Supreme Court and by our Court of Appeals to protect non-physical

things. He took the position that it protected only physical searches.

And so I felt that it was very important to call to your Honor's attention these matters again, in the light of the fact that the Court of Appeals has now found again that Judge Holtzoff's conception of the Fourth Amendment does not accord with what the Supreme Court has said in the Irvine case and the On Lee case.

Although I say to your Honor that I certainly argued this at length to Judge Holtzoff when I was given that opportunity back in October of last year, and thereafter when the matter came on before Judge Holtzoff on a superseding indictment, the Williams case had not come down, and Judge Holtzoff—Judge Youngdahl—said he did not want to hear new argument. That was in a different posture, your Honor, because we were not in trial then, and Judge Holtzoff was very careful to say at the time of the hearing that he was not ruling on
28 whether this evidence could be admitted in the courtroom, he was only passing upon whether or not it could be used in an affidavit to support the search warrant, and he even addressed a question to Mr. Flannery on that very subject, asking whether Mr. Flannery appreciated the difference, and Mr. Flannery responded in the affirmative.

So that I submit that Judge Holtzoff, even in his opinion, to which I respectfully do not subscribe, but, even in his opinion then, did not attempt to bind the trial Judge, but was very explicit in saying that he was not passing on the question for the purposes of trial.

The Court: Well, that's clear.

Mr. Williams: Yes, sir. So, your Honor, I say in the light of the concession made by the Government that the evidence was gathered from a listening device inserted in the baseboard through a party wall to which these defendants had a right, that there was a violation of their Constitutional rights under the Fourth Amendment.

And I say that the evidence, if the Court please, should not be admitted in this courtroom, because it is a violation of the Fourth Amendment to the Constitution.

The Court: Mr. Flannery.

Mr. Flannery: What counsel has said your Honor, is a complete rehash of what was gone into before Judge Holtzoff with one exception—

The Court: I understand that the decision of Judge Holtzoff was reversed.

Mr. Flannery: No, it was not reversed.

The Court: Tell me about it.

Mr. Flannery: The Williams case referred to—contained these facts:

. . . . . .

The Court: Well, if I recollect what Mr. Williams was reading from the Holtzoff case, he said that so far as the affidavit was concerned, he was ruling, and that you conceded that the admissibility of the evidence on trial was a different matter. Is that true?

Mr. Flannery: Well, as a practice—what he read is, of course, correct—but as a practical matter, you and I know, your Honor, that the only reason for filing a preliminary motion to suppress evidence is to decide the legal issues before the trial of the issues. And the only reason for filing a motion to suppress evidence is to get that evidence suppressed so it cannot be used at trial, and the same questions that were decided on that hearing before Judge Holtzoff are the same questions that are being raised here.

And they have been decided adversely to the defendant. There are, in other words, no new legal questions being raised.

The Court: Well, I don't know that I desire further argument on the matter.

The motion will be denied.

. . . . . .

William H. Jewell, Sworn.

Direct Examination by Mr. Flannery:

Q. Agent Jewell, please state your name. A. William H. Jewell.

36 Q. Where are you employed? A. I am employed in the Intelligence Division of the Internal Revenue Service.

Q. Are you a Special Agent? A. I am a Special Agent.

Q. Were you so employed, Mr. Jewell, in April of 1958? A. I was.

Q. Very well. Now, I call your attention to April the 21st, 1958, and ask you sir, did you assist in the investigation of this case on that day? A. I did.

Q. And in that connection, did you go somewhere in the District of Columbia during the evening hours of April 21st, 1958? A. That is correct. I went—

Q. Very well. Did someone go with you? A. Yes, sir; Agent Bedingfield.

Q. Very well. Is he also a Special Agent of the Internal Revenue Bureau? A. He is.

Q. Very well. Now, where did you go in the evening of April 21st, the evening hours? A. In the vicinity of 408 Twenty-first Street, Northwest.

Q. That is in the District of Columbia, is it not? A. That is correct.

Q. Now, specifically, what time did you go to that

37 area? A. At about seven p.m.

Q. Very well. Now, specifically, where did you go? You said to the area of 408 Twenty-first Street. Now, on what corner or what block. A. We drove down south on Twenty-first Street, and then parked originally below Virginia Avenue on Twenty-first Street.

Q. Very well. Now, 408 Twenty first Street, is that near Constitution—Twenty-first and Constitution Avenue? A. It is near Twenty-first and Virginia Avenue.

Q. Near Twenty-first and Virginia Avenue. Then, as

you go south for several blocks, do you run into Constitution Avenue? A. You do.

Q. All right, then, after you—did I understand you to say you parked the car? A. We did.

Q. Very well. What, if anything, did you do next? A. I observed a black 1954 Chevrolet, tag JW-143.

Q. All right. And what did you observe that car do? A. That car was parked on the northwest corner of Virginia Avenue and Twenty-first Street, between the curb and the building line.

Q. Very well. Now, what did you observe in
38 respect to that car? A. Well, with respect to that car, we knew from—

Q. Don't go into what you knew, just what you saw. Go ahead. A. Just saw the automobile parked.

Q. Very well. And after seeing the automobile, what did you do next? A. Agent Bedingfield and I departed that area.

And I returned to that area at approximately ten o'clock.

Q. Ten o'clock p.m.? A. P.M.

Q. The same day? A. Yes, sir.

Q. Very well. Now, when you came back at ten o'clock, what, if anything, did you see? A. I observed that that same automobile was parked directly in front of 408 Twenty-first Street.

Q. All right. And did you observe anything else? A. Later on, at 11 o'clock, p.m., I observed Julius Silverman came out of premises 408 Twenty-first Street and walk to the corner of Twenty-first and E Street, deposit a sack in the trash can there; he walked back down to his automobile, and I observed Jay Doe Number one, who is, I believe, identified as Meyer Schwartz, and Jay Doe Number two, later identified as Robert Martin, come out of 408 Twenty-first Street. All three got in the automobile and
39 drove away.

Q. You say got into the automobile—is that the same automobile? A. The same automobile.

Q. May the record indicate, your Honor, that the witness has pointed to the defendant Julius Silverman?

The Court: It may so show.

. . . . . .

Mr. Flannery: May the record indicate, your Honor, that the witness has pointed to the defendant, Meyer Schwartz?

. . . . . .

40 Mr. Flannery: May the record indicate likewise, your Honor, that this witness has pointed to the defendant, Robert Martin?

The Court: It may so show.

. . . . . .

Q. All right. Now, then, I call your attention to the following day, April 22nd, 1958, did you assist in the investigation of this case on that day? A. I did.

Q. Very well. Now, then, on April the 22nd, 1958, did you go somewhere in the District of Columbia in connection with your investigation of this case? A. Yes, sir.

41 Q. Very well. Where did you go? A. We went to the vicinity of 408 Twenty-first Street. And, more specifically, went inside the premises 410 Twenty-first Street, Northwest.

Q. All right. What time was that, sir? A. At about ten a.m.

Q. Very well. Were you alone, or was someone else— A. I was accompanied by Special Agent Bedingfield.

Q. Very well. Now, did you have a key to 410— A. Yes, sir.

Q. Twenty-first Street? A. Yes, sir.

Q. Then, is 410 Twenty-first Street next door to 408 Twenty-first Street? A. Yes, sir; they are row houses.

Q. They are row houses? A. Yes.

Q. I see. No space between the houses? A. That's right; a common wall between the houses.

Q. Now, then, after having entered 410 Twenty-first Street, Northwest, in the District of Columbia, at about ten a.m., did you see anything or do anything? A. Yes, sir; about 10:45 a.m., I observed Meyer Schwartz and Robert Martin park an automobile on E Street, close to the intersection of Twenty-first Street, and the two of them got out of the automobile, and they walked beyond my view on E Street.

42 And then later, at about 10:58 a.m., I observed the two of them walk down from E Street and enter the premises 408 Twenty-first Street.

Q. All right. Now, then, did you observe anything after that? A. Yes, sir; at about 11:05 a.m., I observed the defendant, Julius Silverman, enter the premises 408 Twenty-first Street.

Q. Very well. Now, then, after you saw the three defendants enter 408 Twenty-first Street, Northwest, as you have related, what did you do next? A. I listened to conversations taking place from within the premises 408 Twenty-first Street.

Q. All right. And how did you listen to these conversations? A. Through the use or aid of the microphone.

Q. A microphone? A. And earphones.

Q. Earphones? A. Yes, sir.

Q. All right. And how was this used? Are you able to tell us that? A. Well, it was a microphone device, that, as near as I understand, is a microphone with a spike, and transmits what you overhear back through the earphones. I am not up on the technical—

43 Q. You say there was a spike? A. Yes, sir.

Q. Have you any idea how long the spike was? A. I think eleven inches.

Q. About eleven inches. And how was the spike used? A. The spike was inserted underneath the—well, up to the wall—

Q. The baseboard? A. Underneath the baseboard.

Q. Underneath the baseboard? A. Yes, sir.

Q. Between 408 and 410, is that right? A. That's right.

Q. Then, do I understand you to say there was some type of earphone you connected to this spike? A. That's right. I believe there was a small box; I believe there was an amplifier, and earphones that you put on your ears.

Q. All right. Did you put the earphones on? A. I did.

Q. All right. Then, were you able to hear anything when you put these earphones on? A. Yes, sir; I was able to overhear what—

. . . . . .

45 Q. Now, Mr. Jewell, I believe you had reached a point in your testimony when you started to relate that you put the earphones on, and that then you heard certain things emanating from 408 Twenty-first Street, Northwest, is that correct? A. That's right.

46 Q. Now, then, what is the first thing you heard?

Mr. Williams: Your Honor, I object.

The Court: Qualify him with respect to his knowledge of the voices.

. . . . . .

(At the Bench:)

Mr. Flannery: I'm a little afraid, your Honor, that I may prejudice these defendants in order to demonstrate that he recognized these voices. He would have to go into other things, because they did watch them, and were listening to them at another location. That is how they knew their voices.

Now, I don't want to do that before the jury, because it would hurt the defendants.

Would you suggest that the Court excuse the jury while I establish the fact that he did—

The Court: Is that satisfactory?

Mr. Williams: I think so.

Mr. Wadden: I think so.

. . . . . .

The Court: The jury will now be excused for a short time until you are called back by the Court, with the usual admonition of the Court.

. . . . . .

47 **William H. Jewell,** resumed the witness stand.

Direct Examination by Mr. Flannery, continued:

. . . . . .

50 Cross-Examination by Mr. Williams:

. . . . . .

53 Q. Now, on the 22nd, when you say you were able to distinguish the voices of these defendants, as
54 they came to you through the earphones that you had, who was it who installed the electronic device for you?

. . . . . .

A. Agent Bedingfield.

. . . . . .

Q. Now, you said that the spike which was inserted into the wall was eleven inches long? A. I said about eleven —I really don't know the exact length; I have never measured it. I would estimate eleven inches.

Q. Was there an instrument on the end of it which was in effect a microphone? A. No, sir; just like a point on the end of it, like a spike, I believe.

Q. How was it inserted, Mr. Jewell, to the wall?

Mr. Flannery: Your Honor, I am going to object at this time. I think we are going a bit afield, beyond
55 the scope of my questioning.

The Court: I think it is getting beyond the scope for the purpose for which this witness was put on the stand in the absence of the jury.

. . . . . .

57 Cross-Examination by Mr. Wadden:

. . . . . .

59 Mr. Wadden: I have no more, your Honor; but at this time, your Honor, I would like to move the Court to exclude any testimony by this witness of conversations which he overheard in which he cannot specifically identify the person who was talking over the telephone, who was talking when he overheard it.

Because, of course, your Honor, the Government had an opportunity here, if they wished to, to proceed on a conspiracy count and a conspiracy theory, and they didn't see fit to do so.

The Court: The Court thinks the witness is sufficiently qualified to testify.

The objection is overruled.

Mr. Williams: Your Honor, Mr. Wadden objected to this.

60 on behalf of the defendants Schwartz and Martin, to this evidence going in, because the voices of the individual defendants had not been properly identified.

I would like to object, and I think he wants to join with me, to this evidence going in, and the predicate of this objection, your Honor, is the argument that I have heretofore made to you at the outset of the trial, on the ground that the evidence is evidence that has been taken in violation of the Fourth Amendment, and I would respectfully ask your Honor to give me an opportunity, for just a few minutes, to interrogate the witness on the nature of the device used, because, up to now, we have no evidence in the record on that subject.

The Court: Well, I don't see why you should question on that.

It hasn't been brought out—except that it was specified an eleven inch spike that went under the wall under surveillance, that it had a point on the end of it. That's all. It was connected to a magnifier to magnify the sounds

that would come through the spike, and that they had the earphones on it.

Mr. Williams: Yes, sir. I wanted to ask him one question, if the Court please, on the manner in which the spike was used, which I think is important to the record.

The Court: Go ahead. Go ahead.

By Mr. Williams:

Q. Mr. Jewell, after the spike was inserted, for the first time, on the 22nd day of April, 1958, how much of
61 it protruded into your room at 410 Twenty-first Street? A. I believe about half of it, sir. I don't know, but I believe about half.

Q. About half. Well, you saw it, of course? A. That's right. I would judge about half of it was still in our room.

Q. About half of it was still in? A. Yes, sir.

Q. Now, was that left in there throughout the period of observation? A. It was left in there until we departed that day, sir.

Q. Did you go on the premises at 408 Twenty-first Street at any time before April 30th? A. No, sir.

Q. That was the first time, on April 30th? A. When we raided was the first time.

Mr. Williams: Yes, sir.

The Court: I don't know whether or not I overruled your objection.

If I didn't, I'm doing it now.

Mr. Williams: Yes, sir.

* * * * * * * * * *

62 The Court:

Bring in the jury.

(Accordingly, at 2:12 p.m., the jury returned to the courtroom.)

The Court: Proceed.

William H. Jewell, resumed the witness stand.

Direct Examination by Mr. Flannery, continued:

Q. Now, Mr. Jewell, you put the earphones, as you started to testify, shortly after eleven a.m. on the 22nd of April, 1958. What is the first thing you heard? A. I overheard the conversations of the three individuals within the premises 408.

Q. Now, whose voices did you overhear? A. Julius Silverman, Meyer Schwartz and Robert Martin.

Q. All right. Now, then, what did you hear? A. I overheard them quoting a line on the baseball game for that day.

63 Q. Well, now, specifically, what did you hear in regard to the line? A. They would quote Washington-Baltimore pick; New York, seven-eight; Kansas City, even six; Milwaukee, six and a half, seven and a half; St. Louis-San Francisco, pick; L. A., seven and a half, eight and a half; Harshman over Lementi, ten twenty.

. . . . . .

Q. I started to ask you—who was Harshman and Lementi? A. They were pitchers.

Q. Baseball pitchers? A. Baseball pitchers; yes, sir.

Q. What else did you hear? A. Brown even ten over Lementi.

64 Wynn-Haeft, pick.

Q. They are pitchers, too, aren't they? A. Yes, sir.

Q. All right. A. Sturdivant fifty-sixty over Sisler.

Q. Sturdivant pitches for the Yankees, doesn't he? A. No—no, sir; I believe he's a National League pitcher.

Q. Anyway, he's a pitcher. All right, what else do you have? After Sturdivant over Sisler? A. Garner ten-twenty over Lemon; Buhl thirty-forty over Kline. Podres fifty-five-sixty-five over Drott.

Q. All right. Now, did you hear anything else after you heard that? A. Yes, sir.

Q. By the way, what are those odds? What were they referring to— A. They would be the line.

Q. The line? A. Yes, sir.

Q. What is the line? A. They are the odds of the baseball games.

Q. All right. And what else did you hear after you heard the line being given over the 'phone? A. I overheard a long distance call to Columbus, Ohio,
65 H-i four, four 0 nine 0, and they asked for Mr. Corey, and said, "This is Julius in Washington. I have a new number, District seven, three five five four. Will be glad to supply the line if you need it."

Q. Did you recognize that voice? A. Yes, sir.

Q. Who was that? A. Julius Silverman.

Q. The defendant, Julius Silverman. All right. Now, what else did you hear? A. I heard a call, Hemlock four, one five eight nine, and they repeated the complete line.

Q. All right. What else did you hear? A. I heard a long distance call to Miami, Jefferson one, six four seven one, and they said, "Albie, this is Washington. We can be reached at District seven, three five five four.

Q. Do you know who made that call? A. I don't really recall, sir.

Q. All right. Now, did you hear anything else? A. I heard a long distance call to Fairmont, West Virginia, four one four two, ask a man if he had called him at his home, called J. J., and he said somebody by the name of J. J. had been trying to get him at home.

Q. Do you know who made that call? A. That was Mr. Silverman.

66 Q. The defendant Silverman. All right. Now, what else did you hear? A. I overheard Mr. Silverman accept a sixty-fifty bet on Baltimore.

Q. Sixty-fifty—what does that mean? Sixty-fifty bet? A. I assume it was put up sixty to win fifty, and—

. . . . . .

Q. (By Mr. Flannery) You heard him say what? A. Sixty-fifty over Baltimore.

Q. All right: And that's Silverman? A. That was Mr. Silverman.

Q. All right. Now, what did you hear next? A. I heard a hundred and twenty dollar bet on Washington accepted.

I heard a Detroit-Kansas City parlay for sixty dollars accepted.

A three hundred dollar bet on Kansas City.

Q. All right. A. Detroit two seventy-five to two-
67 fifty, with a quote, "You are putting up two seventy-five to win two fifty, Joe."

A hundred dollars, Garner over Lemon.

Q. Are they baseball pitchers, too? A. Yes, sir.

Q. All right. Now, what else did you observe? A. At about 2:15, I observed Julius Silverman leave the premises 408 Twenty-first Street.

Q. All right. Did that conclude your— A. Shortly thereafter we left the premises.

Q. Now, with respect to these calls which you have enumerated, were all of those calls made by one of the defendants? A. Yes, sir.

Q. Very well. Now, I call your attention to the following day, April 23rd, 1958; did you conduct a surveillance and further investigation into this case on that day? A. That's right, sir.

Q. All right. Now, what did you do on April 23rd, 1958? A. At sometime between ten and ten thirty, Agent Bedingfield, Officer Stone and I entered the premises of 410 Twenty-first Street, Northwest.

Q. All right. And after you went into 410, what did you do? A. One of them, I don't recall which one, inserted
68 the spike microphone again that day, and we made observations, saw Jay Doe Number one, who is Mr. Silverman, drive up in front of 408 Twenty-first Street. Mr. Martin got out of the automobile and went into the premises, 408 Twenty-first Street. That was at 10:48 a.m., and at 10:54 a.m., Mr. Schwartz went into the premises 408 Twenty-first Street.

Q. All right. So, then what happened after that? What did you do next? A. We listened with the spike microphone, and again were able to overhear the quoting of the odds on the baseball game for that day.

Q. What did you hear with respect to the odds on that day? A. Chicago White Sox, Cleveland pick 'em; Boston, seven-eight; Detroit, five and a half-six and a half; L. A., six and a half-seven and a half; St. Louis, even six; Milwaukee, six-seven; and the pitchers: Pierce-Score, pick 'em; Breuner forty-five fifty-five over Brown; Knox seventy-eighty over Stobb; Foytack ten-twenty over Maas; Erskine thirty-five forty-five over Drott; Gomez ten-twenty over Jones; Sanford thirty-five forty-five over Law, or sixty-five fifty-five over Blackburn.

Q. All those names are baseball pitchers? A. Yes, sir.

Q. All right. Now, what else did you hear on that day? A. I was able to hear a thousand dollar bet on Brewer.

69 Mr. Williams: Your Honor, may it be understood that our objection runs to this whole line of overheard testimony in which this electronic device was employed, so that I won't have to interrupt this?

The Court: Let the record so show.

Q. (By Mr. Flannery) All right. A. I overheard a conversation regarding a five thousand dollar bet on Detroit over Kansas City at the odds of eight to five. This took place between Mr. Schwartz and Mr. Martin.

And the conversation ran that both parties liked Detroit in the game, and they said that they would lay it off, but they wanted to get in touch with Julius to get an okay.

Q. Schwartz and Martin were the two people talking? A. Yes, sir.

Q. I may have misunderstood your testimony. Did I understand you to say that on the 23rd you saw Silverman go into the premises? A. No, sir; I did not see Silverman go in the premises.

Q. Martin and Schwartz? A. I saw Mr. Martin and Mr. Schwartz.

Q. All right. Now, then, what did you hear next? A. Well, I observed about 2:05 that Mr. Martin left the premises, and about 2:15 he came back carrying two sacks, and about 2:25—

70 Q. Let's pass 2:25. A. All right, sir.

Q. What call did you hear—what was the next call you heard? A. A long distance call to New York about five p.m. I missed the number there. About 5:10 p.m., there was a long distance call to Cincinnati, Ohio. I missed the number again, but they asked for Room 14. They gave the fight line as seven nine, don't go, and even seven DeJohn.

Q. Who was DeJohn? A. He was a fighter who was fighting that evening.

Q. All right. Now, what did you hear next? A. About 5:37, there was a long distance call to Miami, Jefferson, and I missed the number again, to a person they called Ruby, and said, "We have changed our number to District seven, three five five four." They gave the fight line as eight and a half ten, don't go, and six to five, pick.

Q. Do you know who made that call? A. That call was made by Mr. Martin.

Q. All right. A. And in that, as a result of that call, they accepted a bet on don't go from Ruby.

Q. What did you hear after that? A. I heard a five hundred dollar bet on the Yankees; a twenty-five dollar bet on Burdette, two hundred and forty to two hundred on Valdez.

71 Q. Who was Valdez? A. He was a boxer who was boxing that evening.

And a twelve hundred dollar bet on Valdez.

Q. Twelve hundred dollars? A. Yes, sir.

Q. All right. Now, then, with respect to all of those conversations about which you've testified on the 23rd, is it your testimony that they were all made by Schwartz and Martin? A. Yes, sir.

Q. Now, what time did you conclude your observations on the 23rd? A. I would say sometime around 7:30.

Q. In the evening? A. In the evening. P.M.

Q. Now, I call your attention to the 24th of April, 1958, and ask you did you conduct a surveillance on that day? A. Yes, sir.

Q. Very well. Now, what did you do on the 24th of April, 1958? A. At about ten, sometime between ten and ten thirty, Agent Bedingfield and I again entered the premises of 410 Twenty-first Street.

Q. All right. Then, did you observe anything from that vantage point? A. Yes, sir; about 10:50 I observed
72 Julius Silverman—I beg your pardon—Meyer Schwartz and Robert Martin enter 408 Twenty-first Street.

Q. All right. And what did you observe after that? A. About 11:15, I observed Julius Silverman enter the premises, 408 Twenty-first Street.

Q. All right. After the defendants had entered 408 Twenty-first Street, as you have described, did you hear anything? A. Yes, sir; I was able to overhear the quoting of odds on the baseball games for that day.

Q. And with respect to the quoting of odds that you heard on that day, what were the odds that you overheard? A. Kansas City even six; Chicago White Sox five and a half six and a half; New York, eight and a half nine and a half, which was later changed to "rained out." Boston seven eight. L. A. seven eight.

Urban five fifteen over Shaw; Wilson ten twenty over Tomanek; Ford seventy-five eighty-five over Ramos; Forniales forty-five fifty-five over Pappas; Mizell ten twenty over Burnside; Spahn thirty forty over Lawrence; Simmons ten twenty over Friend; McDevitt fifty sixty over Hallman.

Q. Very well. Now, after you heard the odds and the line quoted, did you hear any further conversations? A. Yes, sir; I was able to overhear a three hundred dollar

bet accepted on Baltimore; seven hundred dollar
73 to eight hundred dollar bet on the Red Sox; the Baltimore and White Sox parlay for fifteen hundred; Chicago Cubs for fifty dollars.

Q. All right. And were all of these conversations about which you have just testified made by these three defendants, Silverman, Martin and Schwartz? A. They were.

Q. You say that because you recognized their voices? A. That's right.

Q. All right. Now, then, what else did you— A. At about 2:20 p.m., I observed Julius Silverman leave the premises 408 Twenty-first Street.

And at about 2:28, I observed Martin leave the premises 408.

Q. Did you conclude your observation then? A. Shortly thereafter.

Q. Very well. Now, then, I direct your attention to April the 25th, 1958: Did you observe certain things on that day? A. On that day, I observed that, about 10:51, I observed Mr. Martin and Mr. Schwartz enter the premises at 408 Twenty-first Street, and I observed Mr. Martin leave the premises 408 Twenty-first Street in the afternoon of that day.

Q. Did you listen to any conversations on that day? A. No, sir.

Q. And from where did you make your observa-
74 tions? A. From the opposite side of Virginia Avenue, by the State Department.

Q. All right. Now, then, I call your attention to the 29th of April, 1958, did you make certain observations on that day? A. Yes, sir. About 11:00 a.m., I observed Mr. Schwartz enter the premises 408 Twenty-first Street.

Q. All right. A. And in the afternoon, about 2:25, I entered the premises 410 Twenty-first Street, and was able to overhear Mr. Martin and Mr. Schwartz quoting the odds on the baseball game.

Q. On that date, the 29th, did you use any electronic device? A. No, sir; I just had my ear to the wall.

Q. Had your ear to the wall. All right. Now, on the 29th, what time did you discontinue your observations? A. About 3:55.

Q. Now, I call your attention to April 30th, 1958, did you make certain observations on that day? A. The 30th, sir?

Q. Yes, sir? A. Yes, sir. At about 11:18 p.m., I observed Mr. Schwartz and Mr. Martin enter the premises 408 Twenty-first Street, and about 2:25 p.m., I observed
75 Mr. Schwartz leave the premises 408 Twenty-first Street, get into a Buick automobile, Pennsylvania tags, A four seven seven one seven; he drove to the Capital Garage, parked his automobile, and walked to and entered Sam April's Liquor Store.

And I dropped him then; about 4:45 p.m., I observed Julius Silverman enter the premises 408 Twenty-first Street.

Q. All right. Now, on April 30th, 1958, did you have occasion to go to the United States Commissioner? A. Yes, sir.

Q. And did you secure something there? A. Yes, sir; I executed an affidavit and secured a search warrant.

Q. Search warrant for what premises? A. 408 Twenty-first Street.

Q. All right. Did you get certain arrest warrants? A. Yes, sir; there were arrest warrants.

Q. For whom? A. For Julius Silverman, Jay Doe Number one, Jay Doe Number two, which were Meyer Schwartz and Robert Martin.

Q. All right. Now, on April 30th, 1958, were you present when a certain raid was conducted by members of the Metropolitan Police Force? A. Yes, sir.

Q. And did you enter the premises during the raid or after the raid? A. Yes, sir.

Q. What time did you enter the premises 408
76 Twenty-first Street, Northwest? A. I believe I entered the premises at 5:25 to 5:30; it was shortly

after the raid had been in process, because I covered the back door.

Q. All right. And did members of the Metropolitan Police Force conduct that raid and receive certain evidence? A. Yes, sir.

Mr. Flannery: Your witness.

Cross-Examination by Mr. Williams:

Q. You had heard Mr. Martin and Mr. Schwartz converse prior to April 22, 1958? Mr. Jewell. A. Yes, sir.

Q. You had engaged Mr. Schwartz and Mr. Martin in conversation, had you, before that time? A. I never spoke to Mr. Martin personally.

Q. Did you know who Mr. Martin was before the 22nd of April? A. You mean his name?

Q. Yes? A. I knew—no, sir; I didn't know definitely what his name was. I had a reason to believe that it was Robert Martin, but I had no definite knowledge that that was his name.

Q. Well, did you know Mr. Schwartz before the 22nd of April, 1958? A. I had no positive identification
77 of Mr. Schwartz prior to that time, although I had available a picture of him.

Q. Well, did you have a picture of Mr. Schwartz without having his name? A. No, sir.

Q. Did you have his name, or didn't you have his name, Mr. Jewell? A. We had—I had the name Meyer Schwartz, yes.

Q. And you also had a name Robert Martin? A. I knew that Mr. Martin had put some laundry in a laundry under the name of Robert Martin.

Q. Did you have a picture of Mr. Martin? A. No.

Q. When you swore out the affidavit on April 30th, 1958, you called Mr. Martin John Doe Number two, and Mr. Schwartz, John Doe Number one, did you not? A. That is correct, sir.

Q. You called them John Doe Number one and John

Doe Number two because you didn't know what their names were, is that so? A. We weren't positive of their names, sir.

Q. Well, were you able to positively identify their voices prior to the time that you knew their names? A. Yes, sir. Yes, sir.

Q. Now, on April 22, you secured access to the premises at 410 Twenty-first Street, is that right?

78 A. That's correct.

Q. And you entered those premises accompanied by Mr. Bedingfield? A. On the 22nd, yes, sir.

Q. Who else was with you on the 22nd? A. No one.

Q. Had you been into those premises before the 22nd? A. I had not been in there.

Q. Had Mr. Bedingfield been in those premises? A. I believe he had been in prior, I am not certain.

Q. This was the first time that you went in? A. The 22nd was the first time, day I was in.

Q. When you went in, you brought with you the electronic device by which you listened to conversations? A. That is correct.

Q. Would you describe the electronic device for the jury, Mr. Jewell. A. Well, as near as I recall, it was a spike about eleven inches long, which screwed into a little, a little box about, possibly two or three inches square; it was wired in back to what I would call an amplifier, and from that, there was switches on this amplifier, on and off; I believe a battery, I believe it was battery operated, and from this amplifier, there were microphones, and there were headphones that you listened.

79 Q. How many sets of headphones did it have? A. One set, sir.

Q. Did you make an effort to tape record or record in any way the voices that you heard? A. No, sir.

Q. Did you have a recording machine? A. No, sir.

Q. Did you bring this electronic device on the premises

on the 22nd when you in? A. Agent Bedingfield brought them on; I believe he carried them on.

Q. Carried them on on the 22nd? A. On the 22nd, yes, sir.

Q. And it was Agent Bedingfield who set the device up, is that correct? A. That's correct, sir.

Q. And it was set up by inserting the spike into the wall? A. That's right, inserting it underneath the baseboard.

Q. Underneath the baseboard. Do you know how thick that wall is, Mr. Jewell? A. I don't know, no, sir.

Q. Did you make any effort to find out? A. I didn't make any effort, no, sir.

Q. What time was it when you inserted the spike, microphone, into the wall? A. About as soon as we went into the premises, which had been shortly after ten o'clock.

Q. Was this the first time that you had seen this particular device? A. No, sir; I believe Officer Stone or some member of the Police force had shown it to me prior.

Q. Do you recall when that was? A. No, sir; sometime in a month or two prior—sometime in a month or two prior—I saw it down at the Morals Division.

Q. I see. And you sat in the premises at 410 Twenty-first Street and made notes, is that correct? A. That's right, sir.

Q. And what did Mr. Bedingfield do? A. He watched out the window. We traded off on the microphone or the earphones. I didn't sit there constantly and make notes. We traded off.

Q. In other words, is it the fact, Mr. Jewell, that one of you would listen with the earphones while the other looked out the window? A. Well, he either looked out the window or listened at the wall, sir.

Q. Oh, listened at the wall? A. That is correct, sir.

Q. You weren't able to hear through the wall, were you? A. Yes, sir; at times we were able to hear conversations through the wall.

Q. But you weren't able to distinguish words, were you? A. Yes, sir; we were, at times.

Q. Did you—the conversations you testified about here this morning, you heard through your device, is that right? A. Most of my conversations would have been heard through the device, yes, sir; with the exception of the day of the 29th.

Q. Well, you didn't tell us about any conversations on the 29th? A. No specific ones, no, sir.

Q. The only conversations about which you told us specifically were conversations which you claim took place on days when you had the device in the wall? A. That is correct, sir.

Q. Now, were you able to hear conversations, Mr. Jewell, on the premises at 408 Twenty-first Street, other than telephone conversations? A. Yes, sir.

Q. Did you make any notes concerning those conversations? A. I have no notes other than the one that I made reference to on the, on the 23rd, regarding the five thousand dollar bet, Detroit over Kansas City.

Q. May I have your notes, Mr. Jewell?

82 (The witness handed papers to Mr. Williams.)

Q. (By Mr. Williams) Now, are these notes all in your hand? A. They are, sir.

Q. Now, were these the notes which you made at the time that you were sitting in the premises at 410 Twenty-first Street? A. When I was sitting or standing or so on, yes, sir.

Q. Or were these copied from notes that you made then? A. No, sir; they are the original notes.

(Accordingly, Defendants' Exhibits 1-a, b, c, d, e, f, and g, Mr. Jewell's notes, were marked for identification.)

83 Q. (By Mr. Williams) Now, Mr. Jewell, 1-b, a sheet which I am handing to you, constitutes all of the notes that you took on April 22, 1958, is that right? A. That's all the notes that I took, yes, sir.

Q. Now, you were on the premises at 410 Twenty-first Street throughout most of the day on the 22nd, is that correct? A. I went to the premises at about, well, sometime between ten, around ten, I guess.

. . . . . .

Q. I don't think your notes do reflect it? A. I don't have the time there, no, sir. It was shortly after, I believe, Mr. Silverman left.

Q. Sometime around three o'clock? A. Yes, sir.

Q. So that you were there some five hours? A. That's correct, sir.

Q. During that five hour period, you made a record of seven 'phone calls, is that right?

. . . . . .

84 A. I made a record of ten specific telephone calls, I believe, plus the odds that were quoted.

Q. You made a record of a call to Columbus, Ohio? A. Yes, sir.

Q. Made a call to Hemlock four, one five eight nine, is that right? A. Yes, sir.

Q. Made a call to Miami, is that right? A. Right.

Q. Then a call to West Virginia, is that right? A. Right. Yes, sir.

Q. Then you made a record of apparently two incoming calls, is that right? A. I made a record of these two calls.

(Indicating.)

Q. Is this a record of calls? A. Detroit, Kansas City—

Q. I see. Now, were there more calls than these ten in that five hour period, Mr. Jewell? A. Oh, yes.

. . . . . .

85 Q. For how long a period were you listening on the device on the 22nd? A. I would say the majority of the time.

There were times when neither of us were on the device, sir.

Q. You were also there on the 23rd, is that correct? A. Yes, sir.

Q. On the 23rd, only Schwartz and Martin were present, is that correct? A. That's correct, sir.

Q. Mr. Silverman was not anywhere within your observation that day? A. We did not observe Mr. Silverman.

Q. Now, on the 23rd, you made a record of ten calls again? That was between ten o'clock in the morning and 7:20 in the evening, is that right, Mr. Jewell? Check this, I can't read your writing too well. A. Ten calls plus the quoting of the odds, sir.

86 Q. I am asking you about calls. I understand that you quoted some odds there in the notes, but they are— A. Of course, they were all the telephone calls, sir.

Q. On the 24th, you have odds quoted, and you have a record of four calls, is that right? A. That's correct, sir.

Q. On the 24th, you were there from about ten o'clock in the morning until late in the afternoon, is that right? A. Yes, sir.

Q. Now, on the 25th, you didn't go into the premises at 408, or 410 Twenty-first Street, is that correct? A. I believe that's correct.

Q. Were you alone there on the 25th? A. No, sir; I believe Agent Bedingfield was with me on the 25th.

Q. You did not listen on the electronic device on that occasion? A. No, sir.

Q. Did anyone go into the premises at 410? A. Not to my knowledge.

Q. On that date? A. Not on the 25th, I don't believe.

Q. Where did you make your observations from on the 25th? A. The majority of the observation was made from

the south, the south side of Virginia Avenue, by the State Department.

87 About half a block away.

Q. Were you unable to get access to the premises on the 25th, of 410 Twenty-first Street, Northwest? A. No, sir; we had access.

Q. You had a key to the premises had you chosen to use it? A. I am sure somebody had a key to the premises at that time.

Q. But on this particular date, you remained on the street? A. That's correct, sir.

Q. And you remained there for several hours? A. That's right, sir.

Q. All this time Mr. Bedingfield was with you? A. I believe so, sir.

Q. On the 29th, in the only notes you have on the 25th, as I see it, Form 1-c, Mr. Jewell, is that Number one and Number two went in 408 Twenty-first Street at 10:21 a.m.? A. No,—

Q. (Reading) J. Doe #2 leave 408 Twenty-first Street and caught a taxicab? A. That's right; that's right.

Q. For the 25th? A. That's correct. It's, I believe, Mr. Schwartz and Mr. Martin were all we saw. We saw one of them leave.

88 Q. Was there a reason why you didn't go into the premises on the 25th? A. Well, sir, we felt we had basically a situation that we knew what was being conducted there, and, of course, to go in next door, and to leave the premises while there were people inside, could possibly arouse them to us.

Q. Well, were the people inside at the time that you arrived in the neighborhood? A. No, sir; we went in prior to the time that they would arrive. However, we left while they were in there, on occasion.

Q. I am talking now, Mr. Jewell, about the 25th day of April? A. Oh, no, sir; I don't believe—No, sir; nobody was in there to my knowledge.

Q. Well, that's why I asked you what your reason was why you didn't go into the premises. You said, as I understood your answer, that you didn't want to go in while there were people in 408? A. Well, it would necessitate leaving while there were people in there, or possibly necessitate leaving while there were people in there; and that was the particular reason.

Q. You mean, Mr. Jewell, you didn't go in on the 25th because you would have to leave while there were
89 people in there? A. That was basically our reason, that it might upset what we had worked on, and the data we had obtained. We were aware of the moving and so on, and we didn't want to upset that.

Q. So you stayed in the neighborhood throughout that day? A. That's correct.

Q. And observed the premises? A. That's correct.

Q. You were out on the street, but you didn't go in the house at 410? A. That's right.

Q. Was your electronic device in the house on that date? A. No, sir.

Q. Where was that? A. I guess in Agent Bedingfield's or Agent Stone's possession; I don't know, sir.

Q. Were they with you this day? A. Agent Bedingfield was with me.

Q. Do you know whether or not he had the electronic device on the 25th? A. I don't think he had it; I don't know.

Q. Wasn't the reason you didn't go in 410 was because you couldn't hear without the electronic device? A. No, sir.

90 Q. On the 29th, likewise, you didn't have it with you, did you? A. I don't believe so.

Q. Then you did not—Agent Bedingfield did not have it with him either, did he? A. I don't know, sir.

Q. You have no specific reference to any 'phone calls on the 29th, do you—in your notes? A. With the exception of the fact that they were quoting the odds.

Q. Were you in there alone on that occasion? A. That's correct, sir.

Q. Agent Bedingfield was not there with you at all? A. He was outside in the area.

Q. Did anybody, to your knowledge, who was working with you on the 29th, have the electronic listening device? A. I'm not sure, sir.

Q. Did you have it with you on the 30th? A. I'm not sure; I don't believe so.

Q. Now, with respect to Mr. Silverman, the only days on which you saw him present, as I understand your testimony, was the 22nd and the 24th, and then you saw him leave the premises on the 30th, is that so? A. And the 21st, we saw him leave the premises.

Q. On the 21st, you hadn't yet entered the premises
91 at 410 as a listening post? A. That's right.

Q. So that you saw him there on the 24th, and then again on the 22nd, and the 24th, and then again on the 30th? A. That's correct, sir.

Q. On the 30th, you were not on the premises of 410 Twenty-first Street at all? A. Oh, no, sir; not at all, 410.

Q. So the only time that you listened at the wall when Mr. Silverman was present was the 22nd and the 24th? A. That's correct, sir.

. . . . . .

Cross-Examination

By Mr. Wadden:

Q. Mr. Jewell, as I understand it, I am now referring to Defendants' 1 for identification, you made these notes contemporaneous with the dates indicated thereon, is that correct? A. That's right, sir.

. . . . . .

Q. And, in fact, when Mr. Flannery started interrogating you concerning the details in this case, you re-
92 quested permission to use those, isn't that correct? A. That's right, sir.

Q. That was because you felt sure that these papers contained the sum total of knowledge practically that you had in the case, isn't that true? A. That is right, sir.

Q. And you tried to report, did you not, Mr. Jewell, as much information as you could accurately, as you listened over the earphones in the house adjacent to 408? A. That's right.

Q. And where it was possible for you to distinguish the person whose voice you were listening to, you would make appropriate notations, isn't that correct? A. I could distinguish their voices throughout. However, my notes do not reflect these specifics. I wrote them down—as he would say, "Julius in Washington," I wrote that down.

Q. So, at this time, except for the specific notations which you have on Defendants' 1 for identification, you are unable to say which one of these three individuals made an odds quotation or a line quotation, is that not correct? A. With the exception of the one instance where—I don't have it here—I do recall Mr. Martin made a telephone call to Miami to a person they called Rudy. I recall that that was Mr. Martin.

. . . . . .

93 Q. And this is the only call that you can specifically remember as concerns Mr. Martin throughout your surveillance, is that not true? A. Oh, I can specifically recall him quoting the odds quite a few times, sir.

Q. Will you please tell us what odds he quoted and under what dates he quoted them and what he said specifically, sir? A. He quoted the odds on the complete line of the day's game on each of those days, sir.

Q. Well, did you put that down in your notes? A. That Mr. Martin did it? I have indicated in my notes what the line was, and it was quoted, I'd say, a couple of hundred times a day.

Q. But the truth of the matter is that you don't know which one of these three people at any given time was

quoting any particular ticket, do you? A. At any given minute, no, sir, I can't say.

94 Redirect Examination

By Mr. Flannery:

Q. Did I understand you to say that at times you could hear through the wall without the listening device? A. That's correct, sir.

95 Q. And furthermore that you could distinguish the voices of each of these three defendants throughout the period of your observations? A. That's correct.

Q. Recognize their voices? A. Yes, sir.

Q. (By Mr. Flannery) And finally, whether your notes show it or not, you are positive and have testified that all three defendants accepted bets and quoted the odds?

Mr. Williams: I object to that as leading, your Honor.

The Court: Overruled. You may answer.

The Witness: Yes, sir.

96 **Arnold G. Bedingfield, Sworn.**

Direct Examination

By Mr. Flannery:

Q. Where are you employed, Mr. Bedingfield? A. Internal Revenue Service.

Q. In what capacity? A. Special Agent.

Q. Attached to the Intelligence Division, I believe? A. Yes, sir.

Q. Now, Agent Bedingfield, did you assist in the investigation of this case? A. I did, sir.

Q. Very well. Now, I call your attention to April
97 the 21st, 1958, did you do certain things in connection

with this investigation of this case on that day? A. I did, sir.

Q. Very well, now on April 21st, 1958, what did you do? A. Well, I was in the vicinity of Virginia Avenue and Twenty-first, on the evening of the 21st of April, 1958, and I observed a nineteen and fifty-four Chevrolet automobile, District of Columbia license JW one forty-three, parked on the northwest corner of the intersection of Twenty-first and Virginia Avenue, between the building line and the curb.

Q. Very well. And that location is in the District of Columbia, is it not? A. That is in the District of Columbia.

Q. Was there another person with you at that time? A. At that time, I was accompanied by Agent Jewell.

Q. Very well. Now, about what time of the evening was that, do you recall? A. Approximately seven o'clock in the evening.

Q. All right. Now, did you observe anything else that evening? A. At 9:30 that evening, Detective Stone of the Metropolitan Police Department and myself observed the same automobile parked directly in front of the premises 408 Twenty-first Street, Northwest.

Q. All right. Had you left the area between the time 7:00 and 9:30? A. I had.

Q. You came back and saw the car in front of 408— A. 408 Twenty-first Street.

Q. Now, did you observe anything else that evening? A. At approximately 9:58 that same evening, I observed a Buick with a, bearing a Pennsylvania tag, A forty-seven seven one seven, drive onto a lot, directly across the street from the premises 408, and park and an individual referred to as John Doe Number one proceeded from the automobile and entered 408 Twenty-first Street, Northwest.

Q. Do you see John Doe Number one in the courtroom today? A. I do.

(Indicating.)

Q. What is his name? A. Meyer Schwartz.

Q. Meyer Schwartz. All right. Now, did you observe anything else that evening, the 21st of April? A. At approximately 11:00 o'clock on the 21st of April, 1958, I saw the defendant Silverman.

. . . . . .

99 Q. Very well. What did you see Mr. Silverman do? A. He left the premises 408 Twenty-first Street and walked to the intersection of Twenty-first and E, Northwest, and deposited a paper bag at a trash can there, and then he went around and walked back down Twenty-first Street to the automobile, bearing tag JW one forty-three, and about the time he arrived at the automobile, the defendant Schwartz and John Doe Number two left the premises 408 and met the defendant Silverman at the automobile.

Q. Do you see John Doe number two here today? A. I do, sir.

. . . . . .

(Indicating.)

Q. Do you know his name? A. Robert L. Martin; I believe his name is actually Nelson Bloom, but he goes by the name of Robert L. Martin also.

Q. All right. Now, then, that concluded your observations on that date, the 21st of April? A. That did, sir.

100 Q. All right. Now, I call your attention to the following day, April 22nd, 1958. Did you make certain observations on that day? A. I did.

Q. What is the first thing you did on April 22nd, 1958, with regard to this case? A. Well, I proceeded to the vicinity of Twenty-first and Virginia Avenue, Northwest, and—

Q. About what time, sir? A. Approximately ten o'clock

in the morning, or shortly thereafter, maybe ten or fifteen minutes after.

Q. All right. And after you responded to that area, what did you do? A. On that date, we proceeded—I was accompanied by Agent Jewell—we proceeded to and entered the address 410 Twenty-first Street, Northwest.

Q. All right. And after you entered 410 Twenty-first Street, Northwest, did you observe or do anything? A. I did. At approximately 10:45 a.m., we observed the defendants Schwartz and Martin park the Pennsylvania automobile, bearing Tag A forty-seven seven one seven on E Street, just east of Twenty-first, and they, after getting out of the automobile, they proceeded west on E Street on foot.

Q. Very well. Now, what did you see after that? A. Well, a few minutes later, approximately 10:58, the defendants Schwartz and Martin entered the premises 408 Twenty-first Street, Northwest.

Q. In the District of Columbia? A. In the District of Columbia.

Q. All right. Now, then, after you observed Martin and Schwartz enter 408 Twenty-first Street, as you have related, did you see anything else? A. Well, at approximately 11:05 a.m., we observed the defendant Silverman enter the premises 408 Twenty-first Street, Northwest.

Q. And, after all three defendants entered 408, as you have testified, what did you do next? A. Well, we listened in on some conversations.

Q. Instead of using the pronoun "we," just state what you did. What did you do? A. Listened to conversations taking place in the premises 408 Twenty-first Street.

Q. Very well. Did you use a device of some kind to hear these conversations? A. We used a device referred to as a spike mike. It's a microphone which employs the use of a spike.

Q. All right. Will you tell the Judge and jury how you used that particular device? A. Well, you take the spike

and you force it into the wall, or into a crack into the wall, until you hit something solid, and then that will pick
102 up the sound and transmit it through a little amplifier, I believe, and you have a set of earphones that amplifies the sound.

Q. Now, on the 22nd of April, how did you insert the spike on that occasion into the wall? A. I took the spike and pushed it in a little crack that was beneath the baseboard, or in front of the baseboard—there was some beading of some sort, so in order—there was a mount, a finish, moulding, that was up on the floor about, say, about one-eighth of an inch, and the spike was able to go right through the crack.

Q. Into the wall between 408 and 410? A. Yes, sir.

Q. Are they row houses? A. Row houses.

Q. Are you able to say how long that spike or antenna was? A. That was measured, and it is approximately eleven and three-quarters inches, in length.

Q. Now, are you able to tell how far into the wall you inserted the spike? A. Approximately half way.

Q. Half way. All right. Now, then, after you had done that, did you hear some conversations? A. We did.

. . . . . .

103 Q. Now, Mr. Bedingfield, I believe you had reached the point in your testimony where you had inserted this device into the party wall and started to overhear conversations, is that right? A. I had.

Q. Now, then, I will ask you this: What is the first thing you heard?

. . . . . .

104 The Witness: The first thing that I heard that day was various odds being given out on baseball games to be played that day.

Q. All right. Now, specifically, with respect to those odds, what did you hear? A. Well, I—

The Court: This is on the first day?

. . . . . .

* * * The 22nd.

* * * * * * * * * * * * *

The Witness: That's the first day we were in the post of 410 Twenty-first Street.

The Court: Yes.

* * * * * * * * * * * * *

Mr. Williams: We interpose the same objection, your Honor, to this line of testimony.

The Court: It may go to all of his testimony, Mr. Williams.

A (continued) I heard the odds given on the
105 Baltimore-Washington game given as pick 'em, on the White Sox-Detroit game as pick 'em, the New York seven eight, Kansas City-Cleveland, even six.

Q. New York seven and eight, what do you mean? A. Over Boston.

Q. Over Boston. A. They were playing Boston.

Kansas City and Cleveland, even six.

Milwaukee six and a half and seven and a half over Pittsburgh.

And St. Louis and San Francisco, pick 'em.

The Court: What does "pick 'em" mean? Take your choice?

The Witness: Take your choice.

The Court: I see.

Mr. Flannery: Even odds, is that it?

The Court: Even money then?

The Witness: It isn't exactly even money, I don't believe. I think if the bettor puts up six dollars, the house will put up five, and you know the bettor can take his choice on the game.

Mr. Flannery: I see.

The Court: I see.

Q. (By Mr. Flannery) What did you hear after the
106 reference to the St. Louis-San Francisco game? A. I heard Los Angeles seven and a half and eight and a half. They were playing the Cubs.

Q. All right. What else did you hear? A. With respect to the odds quoted on pitchers, I heard in regard to Wynn and Haaft, was pick 'em.

Sturdivant fifty sixty against Sisler.

Garner ten twenty against Lemon.

Buhl thirty forty against Kline.

And McDaniel, Antonneli, even; even ten.

Q. All right. Now, then, what else did you hear? A. I heard the defendant Silverman, in a clear voice, advise one caller that, "I owe you twenty-five hundred and five dollars your way."

Q. And that was Silverman? A. That was Mr. Silverman.

Q. Did you recognize his voice? A. I did recognize his voice.

Q. All right. What else did you hear? A. I heard the defendant Martin call, place a long distance call to Chicago. I didn't get the full number, but I did hear the exchange that was called—it was Franklin two, and dash dash seven three—that part of the number I didn't get, and Mr. Martin says: "Bill, Uncle Bill, this is Bobby Martin."

Q. All right. And did you hear anything else?

107 A. At approximately 12:20 p.m. that day, I heard the defendant Martin talk to a party called Buddy, he referred to him as Buddy in the conversation a couple of times.

Q. All right. A. At 1:30 p.m., or thereabouts, I heard the defendant Silverman talking to a party named Bert, and he referred, he called him at the Taft Hotel in New York, and in the conversation to the party named Bert, he says, "I owe a man in New York twenty-five hundred dollars," and he mentioned a collection agency at the corner of Fifty-third and Broadway, and he asked the party on the other end of the line, "Have you got that much money on you," or words to that effect, and apparently the man said "Yes," because Mr. Silverman answered, "Good, you pay the man and tell him it's from Julius in Washington, and I will settle with you when you get back."

Q. All right. Now, what else did you hear? A. At approximately 1:39 that day, I heard the defendant Silverman advise a caller that, "We do not keep the tickets here. They are taken out each day."

Q. That's Silverman? A. The defendant Silverman?

Q. All right. What else did you hear. A. I heard one of the three gentlemen, I do not recall which, accept two bets shortly thereafter.

Q. You can't recall now which one it was—was it
108 one of these three defendants? A. It was one of these three defendants.

Q. All right. Now, what did you hear with regard to accepting bets? A. I heard the bet accepted, Baltimore one hundred and fifty to one twenty-five.

Q. All right. And what else? A. And another one, Baltimore, thirty-six to thirty. Thirty-six dollars to thirty dollars.

Q. Very well. Now, did you make any other observations? A. I had one other observation, approximately 2:15 that afternoon. The defendant Silverman departed from 408 Twenty-first Street, Northwest.

Q. And did you conclude your observations shortly thereafter? A. Shortly thereafter, I did, sir.

Q. Now, did you write down every call that you overheard, or do your notes reflect certain calls that you made notes of? A. Only certain calls I made notes of.

Q. All right. Now, then, I call your attention to April 23rd, 1958. Did you make certain observations on that day? A. I did, sir.

109 Q. What did you do on April 23rd 1958? A. On April 23rd, nineteen and fifty-eight, shortly after ten o'clock, Agent Jewell, Detective Stone and myself proceeded to premises 410 Twenty-first Street, Northwest, Washington, and entered them.

Q. That was ten a.m., in the morning, was it? A. Yes, sir.

Q. Very well. Now, after you entered 410, what, if any-

thing, did you observe? A. At approximately 10:48 a.m., on April 23rd, 1958, I observed a Buick automobile, Pennsylvania tags, A forty-seven seven one seven, with the defendant Schwartz driving, stop right in front of the premises 408 Twenty-first Street, and the defendant Martin got out of the automobile and proceeded to and entered the premises 408 Twenty-first Street, Northwest.

Q. All right. And with respect to the car, what happened? A. The defendant Schwartz drove down the block and turned left on Virginia Avenue. That would be heading in a southeasterly direction, I believe.

Q. All right. After you observed Martin enter 408, as you have testified, what did you see next? A. Well, the next thing I saw, about six minutes later, or approximately 10:54 a.m., the defendant Schwartz walked back up Virginia Avenue and entered 408 Twenty-first Street.

110 Q. All right. Now, after Schwartz entered, did you hear anything? A. I did. Almost immediately after he entered, I heard the odds given on the White Sox Cleveland game as pick 'em. And that was all I heard at that particular time.

Q. Very well. Now, what else did you hear that you can testify about? A. At 1:45 p.m. on April 23rd, 1958, I heard the defendant Martin accept a thirty dollar round robin bet on the White Sox-Red Sox and San Francisco.

Q. What's a round robin—do you know? A. To the best of my knowledge, it means that you put up thirty dollars, I guess more or less on the order of a parlay—they all have to win, apparently, for you to win the bet.

Q. Oh, I see. All right. Now, then, did you make any other observations on that day? A. At 2:05 p.m., the defendant Martin left the premises 408 Twenty-first Street, and at approximately 2:15, he returned and re-entered the premises, and shortly thereafter, I left.

Q. All right. Now, did you hear many or few calls on that day? A. On that day, that particular day, I, myself, didn't hear too many calls.

Q. All right. Now, then, I call your attention to April 24th, 1958. Did you conduct observations on that
111 day? A. I did.

Q. What did you do on April 24th? A. Well, on April 24th, 1958, I proceeded to the premises 410 Twenty-first Street, Northwest, Washington, approximately ten o'clock in the morning, or shortly thereafter, and entered such premises.

Q. Were you alone or with someone else? A. I was accompanied by Special Agent Jewell.

Q. Very well. Now, after having entered 410 Twenty-first Street, what did you observe. A. At approximately 10:50 a.m., the defendants Martin and Schwartz entered the premises 408 Twenty-first Street, Northwest.

Q. All right. Then what did you see next? A. At approximately 11:15 a.m., the defendant Silverman entered the premises 408 Twenty-first Street, Northwest.

Q. Now, after the three defendants entered 408 Twenty-first Street, as you have related, did you hear anything? A. I did. I heard the odds being given on various baseball games for that day. And they were being given by the three defendants. You could hear the three voices at different times handing out the odds. I couldn't state what particular odds were given out by each defendant. However, I do know that during the course of the day they all gave out the entire—
112 Q. All three defendants? A. All three defendants.

Q. Specifically, what odds did you hear all three defendants give on that day? A. I heard the odds given on Detroit-Kansas City, pick 'em.

White Sox five and a half and six and a half over Cleveland.

And New York eight and a half nine and a half, Washington.

Boston seven eight over Baltimore.

St. Louis five and a half six and half, San Francisco.

Milwaukee six and a half seven and a half, Cincinnati.

Philadelphia five and a half six and a half, Pittsburgh.
Los Angeles seven eight for the Cubs.
And the odds given on the pitchers were:
Ford seventy-five eightly-five over Ramos.
Forniales forty-five fifty-five over Pappas.
Mizell ten twenty over Burnside.
Spahn thirty forty over Lawrence.
And Simmons ten twenty over Friend.

Q. Very well. Now, did you hear anything else? A. I heard the defendant Silverman call a party he referred to as Parker, and he stated to Mr. Parker that, "We are now back at District seven, three five five four," and that
113 is the telephone number of one of the numbers at the location 408 Twenty-first Street, Northwest.

Q. All right. What else did you hear? A. At 12:20 p.m., the defendant Silverman advised a caller that if people kept playing the number, 490, so heavy, it would have to be cut.

Q. All right. What else did you hear? A. 12:45 p.m., the defendant Silverman accepted a fifty dollar bet on the pitcher Pappas from a person he referred to as a Mr. Phillipps.

And the defendant Silverman said, "Okay, Mr. Phillipps, you have yourself a bet."

Q. And that was Silverman and you recognized his voice? A. I did, sir.

Q. Now, what else did you hear on that day, the 24th of April? A. At 12:50 p.m., the defendant Silverman called a person by the name of Sol, and advised him, "We are back at the old number, District seven, three five five four," and that he should forget the North number.

Q. Very well. What else did you hear? A. 12:52 p.m., the defendant Silverman accepted a bet on Urban over Shaw. He stated to the person calling that if Urban didn't go, the bet was off.

114 Q. Urban and Shaw are baseball pitchers? A. They are baseball pitchers.

Q. In the big leagues? A. Yes, sir; that's right.

Q. Now, what else did you observe on that day? A. I observed the defendant Silverman leaving the premises approximately 2:20 p.m., the defendant Martin at 2:28 p.m.

Shortly thereafter, I left the premises 410 Twenty-first Street, Nortwest.

. . . . . .

115 Q. Now, Mr. Bedingfield, I direct your attention to April 25th, 1958, did you make certain observa-
116 tions on that day? A. On April 25th, 1958, I did make certain observations in the vicinity of Twenty-first and Virginia Avenue, Northwest, Washington.

Q. All right. What observations did you conduct? A. At approximately 10:51 a.m., I observed the defendants Martin and Schwartz walking south on Twenty-first Street, and they entered the premises 408 Twenty-first Street, Northwest.

Q. All right. Were you in 410 on that day? A. I was not.

Q. All right. Was there any other police officer or agent with you? A. On that date, April 25th, 1958, I was accompanied by Special Agent Jewell and Detective Stone.

Q. Very well. Now, what else did you observe on the 25th of April? A. At 2:40 p.m., on the 25th of April, the defendant Martin was observed leaving 408 Twenty-first Street, Northwest, and he entered a cab in front of the premises, which turned right on Virginia Avenue and proceeded west.

Q. And— A. And that was all the observations that I had on that day.

Q. On that day? A. On that day.

117 Q. Now, then, I call your attention to the 29th of April, 1958, what did you observe on the 29th? A. On April 29th, 1958, I observed the defendant Schwartz enter the premises 408 Twenty-first Street, Northwest, at approximately 11:00 a.m.

Q. Were you in 410, or outside? A. I was outside of the premises that day.

Q. Very well. What else did you observe on April 29th? A. Approximately 8:35 p.m., on April 29th, 1958, I observed the defendants Martin and Schwartz leave the premises 408 Twenty-first Street, Northwest, and drive off in the Buick, bearing Pennsylvania tags A forty-seven dash seven one seven.

Q. All right, and that's all you did on that day? A. That's all.

Q. Now, that brings us up to April 30th, 1958. What did you do on April 30th? A. On April 30th, 1958, I proceeded to the vicinity of Twenty-first and Virginia Avenue, Northwest, accompanied by Agent Jewel, and that would have been, oh around 10:45 in the morning, I arrived in the vicinity.

Q. All right. And what else did you do on the 30th? A. At 11:18 a.m. on April 30th, 1958, I observed the defendants Martin and Schwartz enter in the premises 408 Twenty-first Street, Northwest, Washington, D. C.

118 At 2:25 p.m., I observed the defendant Schwartz leaving the premises 408 Twenty-first Street, Northwest, and he walked to a Buick automobile, bearing Pennsylvania tags A forty-seven dash seven one seven, which was parked on E Street between Twentieth and Twenty-first, and he drove off in the automobile.

Q. What else did you observe on the 30th? A. At 4:45 p.m. on April 30, 1958, I observed the defendant Silverman entering the premises 408 Twenty-first Street, Northwest.

Q. All right. Now, on the 30th of April, 1958, did you go to the United States Commissioner? A. I did, sir.

Q. Did you swear to a certain affidavit? A. I did, sir.

Q. As a result of that, what did you secure from the Commissioner? A. Warrants were secured for the arrest of the defendants, the three defendants named, and for the premises at 408 Twenty-first Street, Northwest.

Q. Now, then, on April 30th, you went to the premises 408 Twenty-first Street subsequent to a raid? A. I did.

Q. However, I believe Metropolitan Police Force officers conducted the raid and made certain seizures of evi-
119 dence, is that correct? A. They did.

Wednesday, March 18, 1959.

132 **Arnold G. Bedingfield**

134 Cross-Examination

By Mr. Williams:

Q. Mr. Bedingfield, when was it that you were first assigned to the investigation in this particular case? A. I would say it was roughly in November of '57, around that time.

138 Q. Now, let's take the date April 21, 1958.

Did you enter the premises of 410 21st Street on that date? A. I did not enter the premises 410 21st Street on April 21.

Q. Had you entered the premises of 410 21st Street before April 21, 1958? A. I had entered the premises 410 21st Street prior to April 21.

Q. When had you entered those premises before April 21? A. The exact date I could not give you, but I would estimate that it would have been during the month of March, 1958.

Q. Who was with you when you entered the premises in March? A. When I entered the premises I was accompanied by Detective Stone.

Q. And for what purpose did you enter the premises in March? A. To—we went into the premises to see if it would be feasible to use a listening device for the premises 408 21st Street.

139 Q. And did you make a test on that occasion?
A. We did make a test on that occasion.

Q. And how did you make the test? A. We placed the spike mike, as we refer to it, or the electronic device, into the wall, the party wall between 408 and 410 21st Street?

Q. Where did you place the mike in the wall, in what room? A. In the—what would—second floor front facing—that would be facing on 21st Street.

Q. Second floor front.

Now, did you—I don't recall—fix the date on which you did this. A. I could not fix the exact date.

I would say that it was during the month of March 1958.

Q. Did you make any record of your visit to 410 21st Street on that day? A. On that particular day I did not make a record of any visit to—

Q. Did Detective Stone have a key to the premises then? A. Detective Stone had the key to the premises.

Q. Did you insert the spike mike and listen on
140 that occasion? A. To the best of my recollection, we did.

Q. Was there anyone on the premises at 408 21st Street? A. The best I can recall at this time we—that was 408, did you say?

Q. 408. A. To the best of my recollection at this time I cannot recall hearing anyone in 408 21st Street on that occasion, the first occasion.

Q. Well, were you able to make the test that you went to 410 to make? A. Well, we were able to determine that we could place the mike into the wall between 408 and 410.

Q. Well, were you able to determine whether the mike would pick up any sounds in 408? A. To the best of my recollection we didn't hear any sounds coming out of 408 on that occasion.

Q. So that you were not able to make the test for which you went? A. That is correct.

Q. Well, when did you make the test prior to April 21st that would tell you whether or not sounds could be picked up from 408? A. That was either in the—shortly after that date or the early part of April.

141 I think it was—it was probably in the latter part of March that we were able to investigate and find out that the mike would furnish it, or would do the work that we expected.

Q. Well now, did Detective Stone use a skeleton key to go into the premises on that occasion or was it a key that was made for the door at 410 21st Street? A. To my knowledge I just couldn't tell you what key that Detective Stone used to enter the building.

Q. Well, did you make it your business to find out whether you were entering the building with the permission of the owner or not? A. I had been told that we were entering the building by the permission of the person who had charge of the property.

Q. Who told you that? A. I had been told, to the best of my recollection, by both Inspector Layton and Detective Stone.

Q. And that was before the second time you entered the premises at 410? A. That was before the first time.

Q. Before it. A. That I entered the premises of 410.

Q. Now, the second time that you entered was sometime in the latter part of March or the first of April.

142 A. I would say that is correct.

Q. Do you have a record which would show the date on which you entered? A. I do not have a record that would show that.

Q. Were there any occupants of 410 at that time? A. There was, sir.

410?

Q. Yes. A. There was.

Q. Who were the occupants of 410? A. At the time or shortly after we entered 410 on this particular occasion, the defendant Martin was observed entering the premises, to the best of my recollection.

He entered the premises after we had entered 410.

Q. Well, my question may have confused you, Mr. Bedingfield. Let me restate it.

My question was, were there any occupants of 410 at the time you entered? A. Oh, I am sorry.

There were no occupants at 410 at the time that we entered.

Q. And when you say "we," do you mean Detective Stone and you? A. That is correct.

143 Q. And at what time of day was this? A. It was in the early part of the evening, to the best of my recollection.

Q. How long were you there on that occasion? A. Here again, I have no notes or anything I can refer to, but my best estimate would be that it was approximately two to two and a half hours.

Q. Now, as I understand your testimony, during this period Mr. Martin entered 408, is that correct?" A. To the best of my recollection, he did?

Q. Well, Mr. Bedingfield, how many times were you in 410 before April 22, which is the date about which you began testifying? A. I could not tell you exactly how many times I was in 410, but I would estimate that it was three or four times.

Q. And you have told us about the first time and the second time. A. Yes, sir.

Q. Are you sure, are you sure in your own mind that Mr. Martin did enter the premises on the second time that you were there? A. On the second time I am sure that Mr. Martin entered the premises or else he might have been in—but I am sure, and it is clear in my mind right now, that he entered the premises after we entered 410.

144 Q. Was he alone then? A. At the time he entered he was alone.

Q. Did anyone join him there? A. They did.

Q. Now, did you have the spike microphone in the wall at that time? A. We did, sir.

. . . . . .

Q. Now, did you have earphones on this occasion? A. We did, sir.

145 Q. Did you listen on this occasion to any conversations? A. I did, sir.

. . . . . .

Q. And were you able to hear conversations on that occasion? A. I was.

Q. Did you make any record of conversations heard on that occasion? A. I did not make any record of any conversations heard on that occasion.

Q. Did Mr. Stone listen to the microphone on that occasion? A. I am sure he did part of the time.

Q. Did he make any record to your knowledge? A. To my knowledge he didn't.

Q. How long did you listen on this occasion, Mr. Bedingfield? A. Well, as I stated, we were there for, the best of my recollection, maybe two or two and a half hours, and I would say that we were listening from the time that Mr. Martin entered, anyway.

Q. What time did you leave the premises on this
146 occasion? A. Here again, I would have to estimate. I would say it was shortly after 9:00 o'clock, between 9:00 and 10:00 o'clock.

. . . . . .

Q. Did you ascertain who was on the premises with Mr. Martin? A. I did, sir.

Q. Who was that, sir? A. Mr. Gaby Menendez, I believe his name is pronounced. He entered. I believe it is Gabe or Gaby Menendez.

He entered the premises after Mr. Martin had been there.

147 Q. Now, where did Mr. Menendez and Mr. Martin converse? A. I could not tell you exactly where they conversed because I was not in the premises of 408, but it seems to me that they were conversing in the room on the first floor or, well, say, on the first floor of the building, I would say.

Q. But you had inserted the microphone on the second floor. Is that correct? A. That is correct.

Q. Is it your testimony that this microphone on the second floor picked up conversations on the first floor? A. That is correct. I would say that.

Q. Mr. Bedingfield, can you see this board? A. Yes, sir.

Q. How wide would you say the ... ses are, 408 and 410? A. I would estimate they were around 13, 14 feet, sir.

Q. And how long would you say they were? A. This would be strictly a rough estimate, as I have never measured them or seen them measured.

Well, I hate to say. I am not—just to make a rough guess, probably 30 feet.

Q. There are about five of these row houses all 148 next to each other, are there not, on 21st Street?

A. I would say at least five, sir.

Q. And these houses sit, do they not, on the west side of 21st Street, facing east? A. They do, sir.

Q. 21st Street runs north and south? A. That is correct.

Q. South of it is Virginia Avenue? Is that correct? A. That is correct.

Q. And north of it is what street? A. E Street.

Q. Now, both 408 and 410 21st Street have the same design, do they not, interiorwise? A. I would say they are similar. I couldn't say that they were exactly the same.

The only time I was in 408 was—would have been after the raid—during the raid on the 30th of April, and I didn't pay too much attention to the interior on the first floor on that occasion.

Q. Now, let's assume that this is the first floor, the front of the building, Mr. Bedingfield, and that this represents the front door. The first floor is largely taken up with a living room, is it not? A. That is correct.

Q. And in front there is a kitchen, a small
149 kitchen off the front door there, is there not? A. That is correct.

Q. And over here there is a stairway leading up to the second floor, is there not? A. Yes, sir.

Q. On the second floor there are two bedrooms, is that correct? A. Two rooms and a bath on the second floor, sir.

Q. And the bathroom is on the right side as you go up the stairway, or on the north side of the building, isn't it? A. I believe that is correct, sir.

Q. And the bathroom separates the two bedrooms? There is a little hallway here and there is a bedroom back here and a bedroom up in front or, as you call it, two rooms.

Is that right? A. That is correct.

Q. Now, on the occasion that you were there with Detective Stone when you inserted the spike microphone and Mr. Menendez was present in the other house with Mr. Martin, you were in this front bedroom, were you not? A. That is correct. I would say that I was in the front bedroom at that time.

Q. And you testified that Mr. Menendez and Mr.
150 Martin were downstairs in the living room? A. Well, I would say downstairs on the first floor.

Q. Yes. Now, where, Mr. Bedingfield, did you insert the microphone on this occasion? A. It was into the party wall between the front room, the front rooms in the two houses.

Q. Upstairs? A. Upstairs.

Q. So how long would you say this front bedroom is, Mr. Bedingfield? A. There again, it will be a rough estimate, but I would say 12 foot, 11 to 12 foot.

Q. And approximately where in the wall did you insert the microphone, and by that I mean how many feet back from the front of the house? A. From the front of the house, I would say that it would be, oh, three foot, four foot.

Q. So it was closer to the front wall than to the back wall of the bedroom? A. I would say so.

Q. Now, is this the place that you used on each occasion when the spike microphone was inserted? A. That is correct, sir.

Q. Did you make a hole there? A. No, sir.

151 Q. You inserted it under the baseboard? A. Under the molding in front of the baseboard, and then, of course, it went on under the baseboard then.

Q. Under the molding in front of the baseboard and then did you use a hammer to send it into the wall? A. No, sir.

Q. Did you use your naked hand? A. That is correct, sir. Just pushed it in with a—two thumbs, more or less.

Q. You pushed it in with your two thumbs? A. That is correct.

Q. And how far in did it go before it met resistance? A. I'd say approximately half-way. Half the length of the spike.

Q. And the spike was about 12 inches long? A. I believe I testified, sir, it was around 11¾ inches. I think that is correct.

Q. 11¾ inches long.

Now, the walls between or, I should say, the wall between 408 and 410, the party wall, is of double brick construction, is it not?

The Court: Do you know?

The Witness: I do not know just what type of construction there is on that level. I could not say.

152 By Mr. Williams:

Q. Did anybody, to your knowledge, working with you, Mr. Stone, or Mr. Jewell, make any effort to find that out? A. I do not know whether they made any effort to find out just what type wall it was or not. I do know—

Q. Well—excuse me. A. I do know that on the first floor level I could see either concrete blocks or cinder blocks in that party wall.

Q. Well, did you penetrate the concrete block or the cinder block or the brick, whatever it may have been? A. I would say we went in between or through a crack in the block.

Q. Did you— A. Or the brick.

Q. Did you ascertain how much the thickness of that wall was? A. I did not measure the wall for the thickness, no, sir.

Q. Did you go downstairs when you found that Mr. Menendez and Mr. Martin were conversing downstairs, did you go downstairs and insert your microphone? A. No, sir, it was not necessary to go downstairs to insert the microphone.

Q. Now, how many pairs of earphones did you
153 have with this particular mike? A. One pair of earphones.

Q. So that only one of you listened at a time? A. That is correct.

Q. Now, did you leave the microphone in the wall from day to day or did you insert it anew each time you used it? A. Each time that we used it we inserted it anew.

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Q. Now, I am going to hand you, Mr. Bedingfield, what has been tagged by the clerk—

* * * * * * * * * *

154 Q. —Defendant's Exhibit 2-A for identification, and ask you if that is the spike that you inserted into the wall? A. I could not state that this was the exact spike that was inserted into the wall, but I would say it was one of similar construction. And as to the length, I would have to see it measured. I could not tell you.

Mr. Williams: I don't know if we have a ruler here or not, Your Honor. It might help.

[Ruler was handed to the witness.]

The Witness: It is approximately 11¾ inches, or 1/16, maybe, there, over or in between.

Mr. Williams: I think we can stipulate as to 11¾ inches. That is the way I see it.

Mr. Flannery: Is that the way you see it?

All right.

The Court: All right. Let the record so show it.

155 By Mr. Williams:

Q. Now, I am going to hand you what the clerk has marked as Government's Exhibit 2-B, and ask you what this is, sir. A. I do not know the proper name for this, but I more or less refer to it as a little amplifier.

Q. Well, was this the amplifier which you used in this investigation? A. It was of this type.

Q. Now, would you show His Honor and the jury how the spike fits into that, sir?

The Court: Let the jury see it. I can see it.

The Witness: The spike fits into this little hexagon nut here. It just screws right into the nut.

By Mr. Williams:

Q. Now, I am going to hand you, Mr. Bedingfield, what has been marked Defendant's Exhibit No. 2-C and ask you what this is. A. Here again, I do not know the proper name, but I refer to it as a power pack.

Q. As a what?

The Court: What?

The Witness: Power pack.

The Court: Power pack? Something with batteries in it?

156 The Witness: I think so, Your Honor. I believe they have batteries in them.

By Mr. Williams:

Q. Now, how does that fit onto Government's—Defendant's Exhibits 2-A and B? A. This plug fits right in here. I hope it will fit this one.

That's it.

Q. Now, I am going to hand you, Mr. Bedingfield, Defendant's Exhibit No. 2-D, for identification, and ask you what that is. A. This is the headphone or the earphones, or a type similar theretc, that goes with this set.

Q. Is that either the one that you used in this case or one like such—exactly like the one you used? A. I would say it was very similar to the one that we used.

Q. Well, now, will you show His Honor and the jury how the earphones are connected to Defendant's Exhibits A, B, and C? A. The earphones are plugged into the power pack on that order.

Q. Now, after you have all of these parts annexed to each other, the spike is inserted into the wall, is
157 that correct? A. That is correct.

Q. Now, would you show His Honor and the jury approximately how much of the spike was into the wall? A. Well, this would strictly be a rough estimate, but I would say about half the distance, and just measuring it off by hand, I would say something like that.

Mr. Williams: Could we have that ruler again?

[Ruler was handed to Mr. Williams.]

Mr. Williams: Thank you.

By Mr. Williams:

Q. I make it exactly six inches. Is that what you make it, Mr. Bedingfield? A. Well, you are down between my fingers a little bit with the ruler there.

The Court: I noticed that.

Mr. Williams: I didn't intend to put it down there. Put your hands back there and we will measure it again.

The Court: Better get your thumb and forefinger on the same plane.

By Mr. Williams:

Q. Is that it? A. That is about it.

Q. Well, I make it this time 5½ inches.

Is that what you—I will turn it around for you—
158 can you see it now? A. 5½ inches, that is it, approximately.

* * * * * * * * * * *

168 Q. Other than the time you were there, when you heard him talk to Mr. Menendez, did you on any other occasion hear him talk on the 'phone when you were in 410 Twenty-first Street? A. Prior to April 22nd?

Q. Yes, sir. A. At this time I cannot recall any telephone conversations engaged in by Mr. Martin, other than on the night he was visited by Mr. Menendez.

Q. Do you know to whom he talked on the 'phone? A. I do not recall to whom he talked, or whether he identified any of the parties to whom he was talking.

Q. Do you know on what 'phone he talked? A. I do not know, but I imagine it was District seven, three five five four.

Q. Was it a 'phone on the first floor, or a 'phone on the second floor? A. To my knowledge, there was no 'phone on the first floor—

Q. So, it— A. Of 408 Twenty-first Street.

Q. So it was on the second floor? A. It was the second floor.

Q. Now, was there a difference in your reception of voices in the front bedroom on the second floor and
169 voices in the living room on the first floor? A. I could not say that there was much difference at all, that you could hear the conversations from either floor.

Q. Well, how did you make the determination that the conversation between Mr. Menendez and Mr. Martin was on the first floor? A. I recall Mr. Menendez entering the first floor—well, actually how it happened, is that he knocked on the door, and called out, "Marty, Marty," or some name similar to that—or "Bobby," I forget which he called him—and continued to knock on the door, and Mr. Martin went down the stairs to the first floor and

answered the door and let him in, and then this conversation ensued immediately thereafter.

Q. Could you hear the knock on the door over the electronic device? A. I could hear the knock on the door. I could also hear the knock by my naked ear.

Q. Could you hear Mr. Menendez call "Marty" over the device? A. I heard that by my naked ear, if I recall correctly.

Q. Now, did you make, Mr. Bedingfield, at any time, recordings from this electronic device which you were employing? A. Do you mean by the use of a recording device, or pencil and paper?

170 Q. No, I mean by the use of some form of recording device which would reproduce—

The Court: Such as a tape recorder?

Mr. Williams: Yes, sir.

A. To my knowledge, no tape recorder or device of that nature was used to record the conversation.

Q. Well, you would know if such a device were used, wouldn't you? A. I am certain I would.

Q. There was no wire recorder or tape recorder attached to this device to report what you heard? A. There was none.

* * * * * * * * * * *

172 Q. Now, on April 22nd, 1958, when did you arrive at the premises at 410? A. As I testified the other day, I believe it was approximately ten o'clock or shortly thereafter.

Q. Did you make a determination that there was no one present at 408 at the time of your arrival? A. Well, I didn't know whether there was anyone in the premises at 408 when we entered 410 or not, but shortly after arriving, and entering 410, we set up this device, and, of course, then we could not hear anyone or any movements in the premises 408.

Q. Now, did you insert that device into the wall before you determined whether there was anyone present in 408

or not? A. It is possible that we listened with our ears at the wall to see if anyone was next door. We could hear by naked ear also.

Q. I am not asking you what was possible, Mr. Bedingfield, I am asking you, did you make a determination as to whether anyone was present? A. To the best of my recollection, we would listen for—

Q. Not what you would do, but what you did do, sir?

A. To the best of my recollection, I did listen at
173 the wall for a couple of minutes after arriving on that occasion.

Q. And you heard nothing through the wall? A. That is correct.

Q. Now, you couldn't hear normal conversation through that wall, could you, Mr. Bedingfield? A. I didn't catch the question, Mr. Williams.

Q. I say, you couldn't hear normal conversation through that wall, could you? A. I could not hear normal conversation, as you are talking to me now. But I could hear a conversation through the wall with my naked ear.

Q. But you couldn't hear a conversation conducted in the tone of voice in which this examination of you is being conducted, is that right? A. I am sure I could on occasion.

Q. You are sure that you could hear such sounds? A. I am.

Q. Could you distinguish words? A. I could, sir.

Q. Through the wall? A. That is correct, sir.

Q. And this is what you did: You put your ear to the wall to hear conversations in 408 before you inserted the mike? A. I did, on occasion, put my naked ear to
174 the wall, or else use a common, ordinary water tumbler, with the open end placed against the wall and my ear against the closed end of the glass or the bottom of the glass.

Q. Did you use a water tumbler against the wall at 410 Twenty-first Street? A. We did—I did.

Q. You did? A. Yes, sir.

Q. Could you hear anything through the water tumbler at any time? A. I could, sir.

Q. What could you hear? A. Well, some of the conversation that I testified to the other day was taken by means of listening at the wall, by a water tumbler or from my naked ear.

Q. From your naked ear? A. That is correct.

Q. What conversations did you hear from your naked ear through that wall about which you testified the other day? A. I could not state which of the conversations that I testified to the other day was by the naked ear, by the electronic device, or by means of a water glass.

Q. Did you make any notes as to whether you were listening with the electronic device or with your naked ear? A. I did not.

175 Q. Do you have your notes with you today, sir?

A. I do, sir.

Q. May I see them, please?

(The witness handed the notes to Mr. Williams, who, in turn, handed them to the Clerk.)

* * * * * * * * * * *

Q. (By Mr. Williams) Now, you testified that on the 22nd day of April, you heard a telephone conversation to which Silverman was a party, talking about a debt of twenty-five hundred dollars, is that right? A. I remember testifying about that conversation, but I wouldn't want to say, without my notes, as to what day it was.

(Mr. Williams showed the witness the notes.)

A. (continued) That would be on April 22nd, 1958.

Q. And you testified about a call that Martin

176 made to Chicago on that date, is that right? A. That is correct, sir.

Q. And about a call that Martin made to a party called Buddy, is that right? A. That's right, sir.

Q. And about a call that Silverman made to a party called Bunt or Bert? A. Bert.

Q. Bert. And about a call that Silverman made at one thirty-nine? A. That is correct.

Q. Now, can you tell us, Mr. Bedingfield, whether you had the listening device on when you heard those calls? A. I could not tell you whether I had the listening device on or not when I heard those calls.

Q. Did you at any time attempt to get more than one pair of earphones, Mr. Bedingfield? A. I do not recall trying to get more than one pair of earphones. It is possible that I made inquiry to try to get another spike mike on this order.

Q. To whom did you make those inquiries? A. That would have been to our National Office of Intelligence, I presume.

Q. Well, who was the person whom you would contact on that? A. The person to whom I would have contacted would have been Special Agent Gilbert F. Haley.

177 Q. Do you recall such a conversation with Mr. Haley? A. I do recall calling him one morning from my office by 'phone, and asking him if one was available, a set of this type was available.

Q. Was there one available? A. One was not available.

Q. Now, when Mr. Jewell was listening with the receivers to his ears, would you be listening at the wall? A. Part of the time, sir.

Q. What would you be doing if you were not listening? A. Oh, possibly observing out the window to see who was coming or going, if anyone, or keep an eye to see if anyone else was entering the premises 408.

Q. Would Mr. Jewell be doing the same thing when you had the earphones on? A. At times when I had the earphones, it is possible he was looking out, you know, observing at the window.

Q. Now, did either of you make notes as to what recordings, in pencil, the other was making during the surveillance? A. To my knowledge, we did not.

Q. You didn't compare notes? A. We didn't compare notes.

Q. Now, on the 22nd day of April, you were there about six hours, is that right? A. The 22nd day of April,
178 well, we were there from approximately ten o'clock in the morning, or shortly thereafter, or shortly after the entry on my notes says.

Q. That would be about four and a half hours, isn't that right?

(Showing the witness the notes.)

A. I would say we possibly left there approximately 2:30 or 3:00 on that occasion.

Q. Did you make these notes, Mr. Bedingfield, during those four and a half hours, or did you make them at the end of the day? A. My notes were made as I heard the conversation.

Q. And did Mr. Jewell do likewise? A. To the best of my knowledge, he did.

Q. At any point did you record—did you look at Mr. Jewell's notes at any time during your investigation? A. I do not remember looking at his notes at any time during the investigation, no, sir.

Q. You have never compared notes with him on what calls were heard? A. Well, it is possible we might have talked it over at a later date, but it would have been after the investigation was completed. To my knowledge, during the investigation, we didn't compare notes.

Q. You mean at the end of the day on April 22nd, when you were working on this case, this was your
179 days' occupation, you didn't ask Mr. Jewell what he heard, and he didn't ask you what you heard and compare notes? A. No, but maybe when Agent Jewell had the earphones on, he might say, "I hear a conversation," relating to this or that—maybe something of that type.

Q. Now, were you fearful that Mr. Silverman, Mr. Martin and Mr. Schwartz might hear you talking through

this wall while you were conversing concerning what you heard? A. Any conversation that we had was in a whisper.

Q. You whispered? A. That is correct.

Q. And is it your testimony that you whispered for fear that your conversation might be heard through this brick wall? A. That is correct. We kept very quiet. In fact, we even removed our shoes most of the time—would go around in our stocking feet.

Q. Now, when you inserted the spike into the wall, between 408 and 410, did you do that quietly? A. We certainly did, sir.

Q. How did you do that? A. As I explained before, I usually just take my two thumbs and press it into the wall very slowly until it hits something firm, and then I would stop.

Q. Do you know what you were hitting when you put it in? A. I do not, sir.

180 Q. You put it under the shoe molding? A. That is correct, under the molding in front of the baseboard. Of course, it would have to go under the baseboard and then into the wall.

Q. Did you remove at any time the shoe molding along that north wall of the bedroom at 410? A. I did not remove any molding from the wall, sir.

Q. Was there a crevice under which you could insert this electronic device? A. There was, sir.

* * * * * * * * * *

197 Q. At any time, did you or your associates monitor telephone conversations going into District 3554, 5 or 6? A. At no time did I or anyone who accompanied me monitor any telephone conversations going into that address other than by the means of this electronic device that we had here this morning, or ordinary water glasses and the naked ear.

Q. Now, did this device which you have here today, Defendant's Exhibit 2-A for identification, was that a device which could be used also for the purpose of inter-

cepting telephone calls? A. I cannot state whether or not that device can be used to intercept telephone calls.

The only thing that I know that that can be used for is, as I described to you this morning, by placing it into a wall and picking up the conversations from
198 that source.

Q. At any time was there a contact made by you or your associates with the terminal box on the back of the building? A. At no time did I or anyone who accompanied me make a contact to the terminal box at the back of the building.

Q. Did you make an effort to secure from the telephone company the toll slips on calls made from District 7-3554, 5 or 8? A. For what period, sir?

Q. For any period? A. We have in the course of our investigation reviewed the toll slips on toll calls charged to District—the District number, District 3-3554, I believe it is.

Q. District 7-3554? A. Yes, sir.

Q. Did you review the toll slips for the months of March and April? A. The toll slips for the month of March and April, 1958 were reviewed by us subsequent to the raid on the 30th of April, 1958.

Q. Did you secure those from the phone company? A. Well, we secured—we reviewed the toll slips against our notes after April the 30th.
199 We were just checking out some phone calls, numbers referred to in our notes, to see if we could tie them right in with the toll slips, and that we were able to do and there is a possibility that we made a transcript of those calls.

I cannot definitely state at this time; if one was made, Special Agent Jewell probably made it.

Q. Now, what calls in your notes did you check against the toll slips? A. Well—

Q. In your notes. A. For instance, I do remember this: That on April the 22nd, 1958, I referred to a call made

by the defendant Martin to Chicago, Franklin 2-73, to a party named Uncle Bill, he referred to as Uncle Bill.

And to the best of my recollection, the records of the phone call disclosed that on that date there is a toll ticket from—charged to this District number, referring to this Chicago number here.

That is, I didn't get the middle two numerals there. But there was a ticket there for that date, to the Franklin 2-73 in Chicago.

Q. And what other calls did you check? A. If I referred to any others here I am sure I have checked those.

200 I checked them all, I know, when I referred to them.

And that would also refer to the calls that, if any, were referred to in the affidavit.

I believe that is the only number that I refer to in my notes here, unless there are some other pages.

. . . . . .

Mr. Williams: Well, there is Defendant's Exhibit 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G.

. . . . . .

201 The Court: Is that all of them?

Mr. Williams: That is the works.

The Witness: That is it, sir.

. . . . . .

211 By Mr. Wadden:

. . . . . .

. . . would you please tell us how many phones there were in 408?

The Court: If you know.

The Witness: To the best of my recollection there was three telephones in 408.

By Mr. Wadden:

Q. And where were all three of these telephones located? A. Well, at the time we entered the premises on

April the 30th, they were all three located in the front bedroom or the front room on the second floor.

Q. And—

The Court: Were they table phones or wall phones?

212 The Witness: They were table phones.

The Court: On a table?

The Witness: They were on the table, sir.

By Mr. Wadden:

Q. But at the time that you went to 410 to do your initial probing, neither you nor any member of the Metropolitan Police Department, to your knowledge, had been in 408, had you? A. At the—on what date, sir?

Q. On your early March visit. A. At that time none of us had been in 408, to my knowledge.

Q. So it was just a stroke of good fortune that you happened, with all the downstairs available and two and a half rooms upstairs, including a hall, available, that you just happened to put your spike mike in the room where three phones were located.

Is that correct, sir? A. No, sir. I believe that we were able to determine from the records of the Chesapeake and Potomac Telephone Company that all three phones were initially installed in the room on the second floor.

Q. Who made that investigation? A. I couldn't state at this time, or recall, whether it was Agent Jewell or myself.

213 But I believe we were together at the time. It is possible we were both there when we investigated the records for the first time at the telephone company.

. . . . . .

223 Q. Now, Mr. Bedingfield, I believe Defendants' for identification 3 represents the notes that you took as pertains to your surveillance and as pertains to your listening to the electronic device from the 21st of April through the 29th of April.

224 Is that correct, sir? A. I believe those notes are for the 21st through the 30th, sir, of April.

* * * * * * * * * * *

225 Q. Well, will you tell us where you sat during this period of time that you were listening, and I am now talking, sir, about the time that you had the earphones on your head? A. Well, we—part of the time we were sitting against the party wall between 408 and 410. Part of the time we would be standing there.

Part of the time maybe one would be standing where he could observe through the window what was going on on the outside.

* * * * * * * * * * *

Q. Now, would you mind producing, sir, the original notes from which these notes were made? A. That, sir, is the original notes.

* * * * * * * * * * *

226 Q. Didn't you think it was important to take down as much as you could while you were on these earphones? A. I couldn't possibly have taken down everything that occurred but I did take down what I thought should be taken down.

* * * * * * * * * * *

227 Q. Have you examined Government's 1 for identification, sir. A. I have not.

Q. Would you mind looking at it? A. All right.

Q. Now, in your examination you didn't find any erasures or any scribbling or any striking-through in these notes, did you? A. I didn't read all of it but I don't see any indication there offhand of any erasures or whatnot.

Q. Do you take shorthand by any chance, sir? A. I do not, sir.

Q. Now, would you examine your notes and see if they contain any entry which states that you overheard Mr. Meyer Schwartz take a bet? A. I do not see in my notes

here any indication of Mr. Schwartz taking any specific bet.

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Thursday, March 19, 1959.

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239 Cross-Examination—Resumed

By Mr. Wadden:

Q. Do I understand, sir, that the first time the spike mike was placed into the wall in 410 it was placed there by Officer Stone? A. The first time would have been by Officer Stone.

Q. Now, would you describe what Officer Stone did in finding the place that he put the spike in? A. I believe I found the place that the spike was eventually put in underneath the molding in front of the baseboard, as I explained.

And when I called him into the room, I believe he was in the back room at the time, and then we could tell
240 that the space was sufficiently large for the microphone to go in—for the spike, and then he placed the spike underneath the baseboard.

The Court: That was between the floor and the bottom of the molding, was it?

The Witness: That is correct, Your Honor.

By Mr. Wadden:

Q. Now, sir, you found this place, I believe, with a screw driver, did you not? Is that correct, or a wire? A. No, I actually said it was wire. It was a coat hanger, to be exact. That is what it was, a piece of a coat hanger.

Q. And as you pushed the coat hanger into this opening or crack that you found, did you meet any resistance whatsoever? No, with the coat hanger there was no resistance at all until I pushed it in and, as I said yesterday, until I hit something firm, you know, solid like.

Q. And as you pushed this—this wasn't any very large

hole. May the record indicate I am using about a 3-inch diameter.

This wasn't a large hole you found, was it, sir?

The Court: I think he said it was a crack of the space between the bottom of the molding and the floor.

Mr. Wadden: Your Honor, I am now trying to
241 ascertain not how he put it in as concerns the floor and the molding, but how he put it in, how the wall was that it went into.

The Court: Oh, I see.

The Witness: I could not determine the size of the hole in back of the baseboard.

I could only determine the size of the space underneath the molding where the spike went.

I do not know the size of the hole that was in the wall.

By Mr. Wadden:

Q. My question is really this, Mr. Witness: Did the wall in which you placed the mike or in which you placed the wire, was the space small enough so that the spike wouldn't go back and forth as you put it in? A. I never noticed the spike going back and forth as it was put in.

It appeared to be a crevice in the wall.

Q. It was a crevice in the wall which you probed and found and placed the mike spike through the crack. Is that correct, sir? A. It was a—I would say that it was apparenlty a crevice between the bricks or the cinder blocks in the wall.

I imagine that is what it was.

242 I could not definitely state because the baseboard was not tampered with at all.

Q. All right.

Now, Mr. Bedingfield, you placed the mike in the—the spike in the wall yourself on several occasions, did you not? A. I believe that I placed the spike in the wall on two occasions.

Q. And do I understand your testimony to be that you

would locate this crevice, you would take the spike and you would push it through the crevice until you hit against something solid?

Is that correct? A. I would push it underneath the baseboard and the molding until I would hit something solid, that is correct.

Q. And you would push and when the spike could go no further you would stop pushing.

Is that correct? A. That is right. As I pushed with my two thumbs, as I demonstrated yesterday.

Q. Was this a solid object, to the best of your knowledge, that the end of the point would hit? A. I would say that it was solid.

Q. Do you have any idea from anything you might
243 have heard or any feel that you might have gotten from pushing the spike, as to what object you were hitting? A. I do not.

Q. Now, would you step down from the stand, please, and come over to this diagram and in your own manner indicate how far from the 21st Street brick wall running along in this manner you think you placed the spike?

[Witness approached the blackboard]

A. Mr. Williams made this drawing yesterday, and I told him I thought it was approximately three or four feet and considering that this room was 11 by 12 feet, I would say this is approximately the spot in which the mike was placed in the wall.

Q. Three or four feet, is that correct? A. That is correct.

. . . . . .

244 Redirect Examination

By Mr. Flannery:

Q. On each time that the mike was inserted as you have testified, did it go in the approximate same length each time? A. I would say that it went in approximately the

same length each time. Approximately half of the way of the mike.

. . . . . .

247 **Jesse R. Stone**

. . . . . .

Direct Examination

By Mr. Flannery:

Q. Please state your name. A. Detective Jesse R. Stone, assigned to the gambling and liquor squad of the Metropolitan Police Department.

Q. Were you so employed in April of 1958? A. I was.

Q. Now, I call your attention to the month of April 1958, and ask you this: Did you assist in the investigation of this case during that time? A. I did, sir.

Q. All right.

And now, specifically, I wish to call your attention to April the 21st, 1958. . . .

Did you do anything in connection with this case on that day? A. I did.

Q. What did you do on April the 21st, 1958 in regard to this case? A. Well, about 9:30 p.m. on April 21st,
248 I had occasion to observe a Chevrolet sedan with D.C. tags, JW 143, which I had previously checked out and was listed in the name—

Q. Well, don't say who it was listed to. That would be hearsay.

I will ask you this, Detective Stone: Where were you at 9:30 p.m.? A. The car was parked in front of 408 21st Street, and I was right up around the corner on, I believe that is E Street, if I recall.

Q. In the District of Columbia? A. That is correct, sir.

Q. All right, now, were you alone or with someone else? A. I was with Agent Bedingfield.

Q. Very well.

Now then, tell me again, what did you see?

You saw a certain car? A. Saw the car parked in front of 408 21st Street.

Q. In front.

What was the tag number? A. JW 143.

Q. It was a D. C. Tag? A. That is right.

Q. Very well.

249 Now, did you do anything else at that time, at 9:30? A. Shortly thereafter, at about, I think it was 9:58 p.m., I observed a car with Pennsylvania tags, A 47717, operated by the defendant Schwartz, arrive and park across the street from 408 21st and Mr. Schwartz got out and entered premises 408 21st Street.

. . . . . .

Mr. Flannery: May the record indicate, Your Honor, that this witness has pointed to the defendant Schwartz.

The Court: It may.

. . . . . .

Q. Now after you saw Schwartz enter the premises 408 21st Street, did you do anything else at that time?

250 A. I kept the place under surveillance until 11:00 p.m., on the same date.

I observed the three defendants, Schwartz and Martin and Silverman, all come out of the premises 408 21st Street, and get into the Chevrolet with the JW 143, and it was driven away by Defendant Silverman.

. . . . . .

Mr. Flannery: May the record indicate also, Your Honor, that the witness has pointed to the two remaining defendants?

The Court: The record may so show.

. . . . . .

251 Q. All right.

On April the 23rd, 1958 did you go somewhere in the District of Columbia in connection with your investigation of this matter? A. Yes, I would say it was sometime

around, between 10:00 and 10:30, possibly around 10:15, that—

The Court: In the morning or night?

The Witness: In the morning.

—that Agent Bedingfield and Agent Jewell and myself went to premises 410 21st Street, Northwest, and went inside and took up a post of observation on the inside.

Q. Now, how did you gain access to 410? How did you get in? A. We had a key.

Q. All right. Did you have the key? A. I did, sir.

Q. Now, where had you gotten the key to the premises? A. I got the key from the Woodward and Norris Real Estate Company.

Q. All right.

252 Did you personally get the key from Woodward?

A. I went up and got the key myself from the secretary there, I believe.

Q. At Woodward and Norris? A. I forget her name.

Q. All right.

Now then, after the three of you entered premises 410 21st Street, Northwest, as you have described, what did you do or see next? A. Well, at about 10:48 a.m. I observed the Pennsylvania car that I observed on the 21st, with A-47717 pull up in front of 408 21st Street.

The defendant Martin got out of the car and entered 408.

The car drove on down 21st Street and around the corner to the left, and a few minutes later, at 10:54 a.m., the defendant Schwartz came walking back on foot and entered the premises.

Q. Very well.

Now then, what did you do or see next? A. Well, during the course of our observations and listening at about 10:35—no, 11:35, a.m., I heard the—a voice on the phone identify himself as Schwartz and I heard him give out the baseball line.

253 Q. The baseball line? A. That's right.

Q. What is a line? A. Well, I didn't copy down

the line because it was called off so fast that I couldn't catch it all.

Q. But what was the line? What is a line? A. That is the odds on the different games, the rundown on the odds on all the different games that were being played.

Q. All right.

Now then, how did you hear the voice? A. At that time I was—I was using the electronic microphone, the spike.

Q. And now, Officer Stone—first let me show you these various exhibits which have been marked.

First of all, I show you Defendant's Exhibit 2-A for identification and I show you 2-C for identification, 2-D for identification, and 2-B for identification, consisting of a pair of headphones, a power pack, a spike, and another piece of that equipment.

Can you identify that? A. I can, sir.

Q. What are those various Defendant's Exhibits? A. This is the equipment that we used in obtaining some of the vidence that we got up at the premises 408 21st Street.

254 Very well.

All right.

Now, then, is that—was that evidence in your custody and was it the property of the Metropolitan Police Department? A. Yes, sir.

Q. All right.

Now, did you on April the 23rd, 1958, personally insert the spike microphone into the wall? A. I believe I did.

I wouldn't be absolutely sure on that, but—

Q. All right. A. I believe I did.

Q. In any event, are you able to say, or able to tell the jury how this was done? A. Yes.

Q. All right. A. At a point, I'd say, possibly two feet from the front wall of the premises 410 21st Street, on the south wall, the party wall between the two buildings, there was one point there where the spike, by pushing it underneath the baseboard and underneath the shoe mold at the

bottom of the baseboard, the spike would penetrate a certain distance into the wall without any interference.

Q. Yes.

255 Now, this was the wall, was it, between 410 and 408? A. That's right.

Q. And 410 and 408 were row houses built right up next to each other? A. That is right, sir.

Q. All right.

Now, how far did the spike part of this instrument, which I believe is 2-A, Defendant's 2-A for identification, how far did that penetrate into the party wall? A. I'd say actually into the wall less than half-way.

Considering the ¾-inch strip of the shoe mold and ¾-inch for the baseboard, that is an inch and a half, which it was going underneath, why it was still only about a half-way in, counting underneath those, so that I would say it actually penetrated the wall an inch and a half less than half-way.

Q. An inch and a half less than half-way. A. About, approximately.

Q. All right.

Now, do you know how thick the party wall was? A. I obtained blue prints of that wall and as best we could get—

Q. Wait a minute.

256 Where did you obtain— A. I obtained those blue prints from the architect who drew them up, made up the plans.

. . . . . .

[Blue prints were marked Government's Exhibits Nos. 1-A, 1-B, 1-D, 1-E, 1-F, 1-G and 1-H for identification.]

. . . . . .

Q. Now, Officer Stone, I wish to show you at this time these Government Exhibits numbered 1-A through 1-H.

Will you look through those and pick out the one which shows the width of the party wall between 408 and 410 21st Street with respect to the place where you inserted the microphone on the second floor. A. This is the—

Q. Well now, for the record, you are referring to
257 one that is marked as 1-E for identification. A. Now, as I recall, when I went over these plans before I never did see—it might be there, but I don't recall seeing a measurement showing the exact thickness of these party walls.

However, by figuring the over-all width of the building from center wall to center wall as 12 feet and then figuring the clearance on the inside of the room at 11 feet 2 inches, why, as I recall it, that will give you a measurement of around 13 or 14 inches of the entire wall.

The Court: In thickness?

The Witness: I believe that the District Code on these party walls requires an 8-inch masonry wall which apparently that is, an 8-inch masonry wall, when you figure furring out and your plaster board and your plaster, that will give you at least an inch and a half to two inches on either side on top of your 8-inch masonry wall.

Now, of course, when I say a figure of 13 or 14 inches, I am also including the ¾ inch for the shoe mold or the toe mold, whatever it is called, and ¾ for the baseboard, which gives you an extra inch and a half on either side.

Q. I see. A. So that is how I arrived at the figure
258 of 13 to 14 inches total.

And after all, that is where we had to figure from because we were going underneath the toe mold and the baseboard.

Q. I see.

All right.

Now, I believe you had reached the point where you say you heard Schwartz call off the odds on the baseball games. A. That is correct.

Q. All right.

Now, after you heard that, did you hear any further conversation? A. Yes, at about 11:40 a.m., I heard a voice on the phone in 408 identify himself as Martin and he took a bet for $600 on the pitcher Burdette.

Q. Is Burdette a baseball pitcher? A. That is correct.

Q. All right.

Now, then, did you hear anything else on that day? A. Well, sometime around 12:30 in the afternoon—I wasn't using the electronic equipment at the time. I was listening with my ear to the wall.

Q. Well, could you hear with your ear to the wall?

259 A. That's right.

Q. I see. A. And Agent Jewell, I believe, was using the microphone at the time and I overheard a conversation between the two voices in the room 408 relating to a $5,000 bet on Detroit over Kansas City, I believe, were the two teams the bet was on.

And these voices were expressing their reluctance to hold this bet without first getting an O.K. from Julius.

Then they made several telephone calls.

We could hear them calling and asking if Julius was there and we never did—could determine whether they ever contacted him or not, but we did hear calls where they were asking if Julius was there.

The Court: You heard all that with your naked ear pressed against the wall?

The Witness: Yes, sir.

By Mr. Flannery:

Q. And did you recognize those two voices that you heard in there? A. Well, I had heard those two voices—

Q. Well, just, did you recognize them? A. That is right.

Q. All right, and whose voices were they? A. Martin and Schwartz.

260 Q. All right.

Now, did you hear anything else on that day? A. Well, at about 1:05 p.m. on the same date I overheard a telephone conversation in which Mr. Martin called a number and I thought it was either to Cincinnati or to Chicago.

I wasn't absolutely positive of the city, but I thought it was Cincinnati.

And he talked to someone on the other end and told them to call their bets in from then on to District 7-3554.

And during the conversation he told them that they didn't accept bets on horses, that they only took bets on sporting events and fights.

Q. Fights. A. Now, I was using the microphone at that time.

Q. All right.

Now then, what else did you hear or do or see on that day? A. Well, at about 2:05 p.m., on that same date I observed the defendant Schwartz leave the premises 408 24th—21st Street and walk up the street and he returned at about, I'd say about 10 minutes later, carrying a bag.

It looked like it might be sandwiches or food.

Q. All right.

261 Now, did anything else occur on that day which you saw or did you drop your observations shortly thereafter? A. Well, I overheard other conversations through the wall but I don't recall any of them.

Q. Very well.

Now, the other conversations that you overheard through the wall, what did they concern? What were they about? A. Well, concerning the line, giving out the baseball line and so forth and so on, but I don't recall any of the details on it.

Q. Very well.

Now then, what time, approximately what time did you conclude your observations on that day? A. As well as I can remember we left those—left 410 21st Street at about 8:00 p.m. in the evening, right about that time.

Q. All right, sir.

Now, then, when was the next day you did anything in connection with this case? A. On April the 25th at about 10:51 a.m., I observed the defendant Schwartz and Martin enter the premises 408 21st Street, Northwest.

Q. All right.

Now, from what point did you observe that?
262 A. I was parked down in the three hundred block of 21st Street down below Virginia Avenue down there.

Q. Did you make any other observations on that day?
A. No, not that I recall.

Q. All right.

Now then, when was the next day that you did anything in connection with this case? A. I believe the next day that I had any active part in it was on April the 30th, on the day of the raid.

Q. All right.

Now, on April the 30th, 1958, did you go to the U. S. Commissioner? A. I did, sir.

* * * * * * * * * *

263 Q. * * * Now then, there did come a time, did there, when you went back to the vicinity of 408 21st Street, Northwest, on April the 30th, 1958? A. Yes, sir.

* * * * * * * * * *

Q. Who else went along? A. Lieutenant Foran and myself went there together, and we had the warrant in our possession.

Q. What time did you go there? A. I'd set the time, possibly, shortly after 5:00 o'clock, maybe 5:05, or even possibly 5:10.

Q. P.m.? A. That's right, sir.

Q. All right.

Now, what warrants did you have in your possession? A. We had a search warrant for the premises 308 21st Street.

The Court: 308 or 408?

The Witness: 408 21st Street.

264 By Mr. Flannery:

Q. That is Northwest? A. That is right, sir, and arrest warrants for the three defendants.

Q. Very well.

Now then, when you arrived in that area shortly after 5:00 p.m. on April the 30th, 1958, what did you do, what did you see? A. I took up a position on the southwest corner of 21st and Virginia Avenue.

We were trying to get ourselves organized and set up to execute the search warrant and that was my position at that time, to take up a position where I could cover the back door or see the back door of the premises.

Q. All right. A. And move into them.

Q. And what happened next? A. Well, I'd say at about 5:18 or close to 5:20, I observed the defendant Silverman walking across the street from 408 21st Street, and I saw Lieutenant Foran run up the street and intercept him right across on a parking lot across from 408, and place him under arrest.

And at this time I ran up to the front door to assist Lieutenant Foran and we took—Lieutenant Foran brought the defendant back over to the front door of the premises and the defendant, after Lieutenant Foran advised him that we had a search warrant for these premises for gambling violations, the defendant took from his pocket the keys for the front door and unlocked the front door.

Q. Very well.

Now then, after the defendant Silverman unlocked the front door, what did you do next? A. I immediately ran up the stairs to the second floor and on the way up the stairs I was calling out in a loud voice that we were police officers and had a search warrant for gambling violations.

And when I got to the top of the steps where I could look back into the front room, why, Mr. Schwartz was rushing towards the door leading into that room and Mr. Martin was just getting up out of the chair where he was sitting at the table.

Q. At a table? A. Yes, sir.

Q. All right.

Now what did you do when one of these defendants rushed to the door? A. Well, he beat me to the door and he almost got it closed before I got there, but I did get there just in time to push the door open before he could get it latched.

Q. All right.

266 And then, as you entered the room, what did you see? A. There was two—two tables lined up on the righthand wall going in the door, which would be on the south wall of the building.

Q. The south wall of the building? A. The south wall of the building which would be the opposite wall from four o—410.

Q. Would that be the—part of the same party wall at which you had been investigating from the other side? A. No, that would be the opposite wall.

Q. I see. A. And on this wall in front of the tables on the south wall, a heavy rug had been nailed all over that wall completely covering that wall.

Q. And that was the wall opposite to the wall at which you had been listening? A. That is right, sir.

Q. I see.

All right. A. And on this—

Q. Go ahead. A. On these two tables there, there were two—or three telephones, District 7-3554, 3555, and 3556, and they were apparently hooked up on a rotary

267 basis, where if you call 3554 it would automatically switch to the other number.

Q. Very well.

Now then, what else did you see? A. On the television set there was a stack of bet slips.

* * * * * * * * * * *

[Group of slips was marked Government's Exhibit No. 2 for identification.]

* * * * * * * * * * *

[At the bench:]

Mr. Williams: Your Honor, neither Mr. Wadden nor myself has wanted to clutter the record by constant objections to this, but I did think that since we have a new witness here now that I should say to Your Honor that, of course, we are objecting as we have in the past to everything that he heard and we are objecting to all of this physical evidence that is now going in and to anything that occurred on the 30th, by reason of the fact that we
268 claim that the search warrant was invalidly executed by reason of having been based upon evidence seized in violation of the Fourth Amendment rights of the defendants.

I think Your Honor would prefer that we do it this way rather than constantly get up and object to each question.

The Court: I certainly would.

Mr. Williams: And I just wanted to preserve the record so that there wouldn't be any question of waiver at a subsequent date.

The Court: And you join in that?

Mr. Wadden: I join in that.

Mr. Williams: Is it agreeable to you, Mr. Flannery, that our objections are preserved this way rather than constant interruptions?

Mr. Flannery: Certainly.

The Court: Objections overruled.

* * * * * * * * * * *

269 Q. Now Detective Stone, I will hand you this pack of white pieces of paper with notations on them which have been marked for the record as Government Exhibit 2 for Identification, and I want you to take your time and look at that pack of slips and tell me, after you have completed your examination of them, how you can identify them? Tell me, also, how many of them there are? A. There are fifty-five of these slips. All of these are the slips I took off of Silverman's.

Q. How do you identify these pieces of paper known as

Government Exhibit 2 for Identification? A. They have the date and my initials written on the back of each slip.

Q. Where did you recover these? A. They were on the television set right alongside an average sized trash can located there with a grate affair on top where apparently papers had been burned. Apparently these slips were laying alongside this grate.

Mr. Flannery: I wish to offer into evidence these pieces of paper as Government Exhibit 2 which have been marked Government Exhibit 2.

The Court: Your objection is overruled, they may be admitted into evidence.

(Pack of slips admitted in evidence as Government Exhibit 2.)

Mr. Flannery: Thank you.

By Mr. Flannery:

Q. Now Mr. Stone, what did you do next? A. Well, immediately after entering the premises, of course the telephones were all started to ring and I did answer some calls.

Q. Before we get to that let me ask you this—

Mr. Flannery: Mr. Clerk please mark these as Government Exhibits 3 and 4 for Identification and these as Government Exhibits 5 and 6 and 6A for Identification.

Mr. Williams: Our position, Your Honor, is the same with respect to Government Exhibits 6 and 7 as it has been with respect to the previous exhibits that have been marked.

The Court: The record may so show.

(Documents marked Governments Exhibits 3, 4, 5, 6, and 6A for Identification.)

By Mr. Flannery:

Q. Now Detective Stone, I will show you what has been marked Government Exhibit 3 for Identification. Can you identify that? A. This is a copy of the baseball

fight and fight line which was taken from one of the tables there where the telephone was.

Q. Did you take that? A. I did, sir.

Q. How do you identify it? A. By my initials.

Q. And the date? A. Yes, sir.

Mr. Flannery: Your Honor, I wish to offer into evidence Government Exhibit 3 for Identification.

The Court: It may be. The objection has been noted and overruled.

(Document admitted into evidence as Government Exhibit 3.)

By Mr. Flannery:

Q. Detective Stone, I will show you what has been marked Government Exhibit 4 for Identification and ask you if you can tell me what it is? A. This is a similar baseball and fight line and this was also on one of the tables where the telephones were located.

Q. Can you identify this by your initials and date thereon? A. Yes, sir.

272 Mr. Flannery: I wish to offer into evidence Government Exhibit 4 for Identification.

The Court: It may be received. Objection of counsel overruled.

(Document (baseball and fight line) marked Government Exhibit 4 for Identification admitted into evidence as Government Exhibit 4.)

By Mr. Flannery:

Q. I will show you this piece of white paper bearing a list of names and notations on both sides of it known for the record as Government Exhibit 5 for Identification. Will you look at it, sir, and tell me whether you identify this? A. This I also removed from one of the tables where the telephones were located on the second floor of 408 Twenty-first Street, Northwest, and it has my initials on it.

Mr. Flannery: Your Honor, I wish to offer at this time Government Exhibit 5 for Identification into evidence.

The Court: It may be admitted, the objection being overruled.

(Document (paper bearing names and notations on both sides) marked Government Exhibit 5 for Identification admitted in evidence as Government Exhibit 5.)

By Mr. Flannery:

Q. Now, Detective Stone, I, at this time, show you this brown envelope known as Government Exhibit 6A for
273 Identification. Can you identify that? A. This I can. That is the envelope in which the lease found in the premises at 408 Twenty-first Street, Northwest, was.

Q. Obtained? A. Yes.

Q. All right, I now show you what had been the contents of that envelope, Government Exhibit 6 for Identification, a lease. Can you identify that? A. Yes, this is a lease that I found, I found in a dresser drawer in the second floor rear bedroom of 408 Twenty-first Street and it is a lease for the premises for 408 Twenty-first Street.

Mr. Flannery: Very well.

Your Honor, at this time I wish to offer in evidence this lease, Government Exhibit 6 for Identification.

The Court: Your objection goes to this too?

Mr. Williams: Yes, sir.

The Court: Overruled and it may be admitted in evidence.

(Government Exhibit 6 for Identification (lease) admitted in evidence.)

By Mr. Flannery:

Q. Now then, finally I will ask you to step down if you will, Detective Stone, I want to show you—

Mr. Flannery: Mr. Clerk, let this be known as Government Exhibit 7 for Identification.

274 (Document marked Government Exhibit 7 for Identification)

Mr. Flannery: And the contents known as Government Exhibit 7A for Identification.

(Document marked Government Exhibit 7A for Identification)

By Mr. Flannery:

Q. Now Detective Stone would you look at the contents of this box and tell me whether you can identify it? A. These are books that I did not initial for identification. The contents of this box I did not initial for identification. However, I did turn these books into the Property Clerk and the tag which is on the box is in my handwriting and it has my name signed to the tag.

Q. Now in regard to these books where did you see them? A. They were in the closet of the bedroom on second floor, the front bedroom.

Mr. Flannery: All right, you may resume your seat on the witness stand.

Your Honor, I wish to offer into evidence at this time these two exhibits, namely, Government 7, the box, and 7A for Identification, the contents of the box, these books.

The Court: It will be admitted, the box and the contents, the Court being cognizant of the defense's objection, and it being overruled.

By Mr. Flannery:

Q. Were pictures taken of the second floor room
275 while you were there? A. Yes, sir.

. . . . . .

(Documents marked Government Exhibits 8, 8A, 8B, and 8C for Identification.)

. . . . . .

Q. Now, I will show you what has been marked as Government Exhibit 8 for Identification, this picture. Now

does that depict a portion of the room on second floor of 408 Twenty-first Street, Northwest, as you so testified?

A. It does.

276 Mr. Flannery: Your Honor, I wish at this time to offer Government Exhibit 8 for Identification into evidence.

Mr. Williams: Your Honor, may we come to the bench?

(At the Bench:)

Mr. Williams: Your Honor, I object on the basis heretofore stated, to these pictures which were the result of an illegal search. I wish to object on the additional ground, Your Honor, that those pictures were taken during the period of the legal occupancy by the police and the Agents of the Bureau of Internal Revenue because, assuming for the purpose of this discussion that the agents were legally on the premises in the first instance and the search warrant was valid, which we deny, nonetheless I believe it is basic that police officers may go on premises for the purpose of searching and seizing contraband, the fruits of crime, but they may not go on those premises for the purpose of gathering evidence.

. . . . . .

277 The Court: Your objection is overruled.

. . . . . .

The Court: It may be received in evidence.

(Document marked Government Exhibit 8 for Identification admitted in evidence as Government Exhibit 8.)

By Mr. Flannery:

Q. Now Detective Stone, I will show you this picture known as Government Exhibit 8A for Identification, does that depict a portion of the room which you testified you entered on April 30, 1958? A. It does.

Mr. Flannery: Very well.

Your Honor, I offer Government Exhibit 8A for Identification in evidence as Government Exhibit 8A.

The Court: It may be admitted.

(Document admitted in evidence as Government Exhibit 8A (picture showing part of room).)

By Mr. Flannery:

Q. Now, I will show you finally Government Exhibit 8B for Identification. Can you identify that? A. I can.

278 Q. And does that picture depict the second floor door of the room which you testified you entered and also a view into the room from the hallway on the second floor? A. That is correct.

Q. Now then I will show you finally Government Exhibit 8C for Identification. Does that show a portion of the room about which you have testified you entered? A. It does.

Mr. Flannery: May these remaining photographs be received in evidence, Your Honor?

The Court: They may be received in evidence.

(Documents marked Government Exhibits 8B and 8C admitted into evidence as Government Exhibits 8B and 8C.)

By Mr. Flannery:

Q. Now that these have been admitted in evidence, Detective Stone, in order that the jury may more clearly understand these photographs, I will ask you to step down here, if you will. (Witness left stand and stood in front of jury.)

I hand you Government Exhibit 8.

Mr. Flannery: Stand here so the jury can see.

Q. Will you explain to the jury what that photograph shows and speak loudly so the jurors can all hear and the reporter can hear. A. This shows a view of the south wall of the building, 408 Twenty-first Street and two tables

279 lined up, doesn't show the complete two tables, it only shows to here and the outer part of the picture

here is part of the front lawn and window which was wiped out by heavy black cloth and the tables there and the chairs and the telephones and the television antenna in the background.

It also shows the rug that was on this wall directly in front of these tables on the second floor.

Mr. Flannery: Keep your voice up, please.

Q. What does it show on the tables, lying on the tables? A. It shows that the line sheets which have been already introduced here and in addition the pads and notes on the other parts of the table, there were other pads and notes.

Q. And did I understand you in your testimony to say one of the defendants appeared to be getting up from a table when you entered? A. That is right.

Q. Is that table shown in the picture? A. Yes, sir, you will see this one here.

Q. Now then I will show you Government Exhibit 8A for Identification, will you explain that briefly? Does that show part of the same? A. This shows the same wall only it shows the ends of the table that are missing from part of the photograph and it shows part of the rug of the wall here and by the telephone, and it also shows the door.

280 of the closet from which those books that are marked in evidence here and some other paraphernalia which has been entered.

• • • • • • • • • • •

Q. Now, I will show you Government Exhibit 8B for Identification. Please explain to the jury what that shows? A. This shows the doorway leading into the second floor bedroom where the tables, chair, telephones, and file cabinets were located. This down here was a satire built up in the front door. This is the stairwell down at the extreme corner coming up from the first floor. You have to come up that long stairway and then make a turn around and go back to get into this second floor front.

Q. Now that stairway up which you came is that the door

through which you entered as you have testified? A. That is correct.

Q. Now I will show you this final picture, Government Exhibit 8C for Identification. Does that show a portion of the room? A. That shows the wall of the room overlooking the street, that would be the east wall of the premises and it shows the file cabinet which appears in the other picture and a portion of the north wall between 408 and 410.

It also shows the part of the little incinerator basket that was located in the middle of the floor where
281 apparently someone had been burning papers.

Q. Now then Detective Stone, did there come a time while you were in these premises that the phone rang? The phones rang? A. The phones rang almost continuously while we were in the premises.

Q. Very well. Now just answer yes or no for a moment. Did there come a time when you answered certain of those rings on the phone? A. Yes, sir.

Q. Now then tell me this, when you picked up the phone did you at any time impersonate the receiver of the call, of the person who was being called? A. No, sir.

Q. Did you make notes of any calls that came in? A. I made notes of I think three or four calls that I received and which I thought warranted taking notes on. Of course, I received many calls in which persons were asking for Mr. Silverman, Schwartz; or Martin, and when they found out I was neither of them they wouldn't talk to me so I couldn't get anything. I didn't make any notes on those particular calls.

Q. Were there certain calls about which you did make notes? A. Yes, sir.

282 Q. What is the first call about which you made a note?

. . . . . .

(At the Bench:)

Mr. Wadden: Your Honor, to make my objection very short, I adopt Mr. Williams' objection to the photographs

as being applicable to these phone calls. The warrant authorized them to go on the premises but did not authorize them to go there and gather evidence such as telephone calls which might be incriminating, so on that basis I object.

Mr. Williams: I object also, Your Honor.

. . . . . .

284 Mr. Wadden: I have one further objection and that is, it is patently clear that any statements made over the telephone to someone else is completely hearsay as concerns these defendants, absolutely hearsay.

Mr. Williams: Yes, it couldn't help but be.

The Court: Your objection is overruled.

Mr. Flannery: I think the Court should point out to the jury this evidence, as was said in the Billeci case,
285 should be for the limited purpose of showing the nature of the premises for which we have charged these people with.

The Court: How about the telephone conversations?

Mr. Flannery: They show the nature of the premises.

Mr. Wadden: That is the sole purpose for which Your Honor is admitting it?

The Court: Yes.

Mr. Wadden: Thank you, Your Honor.

(End of Bench, Open Court:)

By Mr. Flannery:

Q. Now then Detective Stone, tell the jury about the first call which you answered and what you heard about which you made a note? A. I have notes here, if I may refer to them?

Q. Do you need those notes to refresh your recollection? A. Yes, I do.

Q. Were those notes made contemporaneously with the receipt of the call? A. They were made at the time, yes, sir. The first call that I made a record on was at 6:40 P.M.

Q. Night? A. Of April 30. A man, an undentified
286 man, I couldn't get his name, called and wanted a run down on the ball games on the odds on the ball games and I gave it to him from the sheets that I saw.

Q. You gave him the odds? A. Yes, sir, and at 6:50 P. M. a man who identified himself as Bucky from Philadelphia called to get the line.

Q. Did you give Bucky a line? A. I gave Bucky the line and I also made a check later and found out the name Bucky appears on the list that is marked in evidence of apparent customers and people who were doing business with the operation.

Q. I see, this list number 5 which has been introduced in evidence? A. Yes, sir.

Q. Were there any other calls? A. At 6:52 I took a call from a man who identified himself as Murray in New York and he called to get odds on a fight.

Q. Did you give Murray the odds? A. Yes, sir.

The Court: Ladies and gentlemen of the jury the testimony that has just been given with regard to the telephone answers, conversations, is admitted solely for the purpose of showing the nature of the premises and for the purpose for which the premises were used.

. . . . . .

288 Cross-Examination

By Mr. Williams:

. . . . . .

289 Q. When was it, Mr. Stone, that you obtained the key to the premises at 410 21st Street? A. Well, I don't have any precise memory as to the exact date, but I would say possibly sometime between the 15th and the last day of March, sometime during that period.

Maybe sometime between the 15th and the 25th.

Q. Did you yourself get the key? A. I did, sir.

Q. And from whom did you get it? A. I got it
290 from the secretary, a lady—I can't remember her name offhand, but she is the secretary in the firm of Woodward and Norris.

Q. When was it that you secured the plans for the buildings at 410 and 408 21st Street? A. That was after the raid, sometime after the arrest of the defendants, that I got the plans.

Q. How long afterwards did you get the plans? A. I'd say sometime within the following month?

. . . . . .

291 Q. Now, after you secured your key to the premises of 410 21st Street, when did you first enter those premises? A. Now, there again, I—I didn't make any notes on the exact date that we went in there on the first occasion—or I believe there were about three occasions prior to April the 21st that we went in those premises.

But we didn't obtain anything that we felt was necessary for evidence at the time and consequently I didn't make any record of the dates that we did go in there.

However, there were about three, I believe, three occasions that we went in there.

Q. And those occasions were in March and April of '58, prior to April 21? A. I would say that it is more likely that they were sometime the latter part of March.

Q. Had you been in the premises of 410 21st Street before you obtained the key from Woodward and Norris? A. No, sir.

. . . . . .

295 Q. Now, on the occasion of your first entry into the premises at 410 21st Street, did you have in your possession, Sergeant Stone, the instrument which has been marked for identification as Defendant's 2? A. I believe that—I believe that I did.

To the best that I can remember, I did have that.

Q. And on that occasion did you insert the spike in this

instrument into the wall at 410 21st Street? A. Now, that I can't—I can't say definitely on that either, whether—in fact, as I said, I can't say for sure that we had it on the first occasion that we went there.

But if we did have it, well, the chances are that we did—it was inserted in the wall, but I couldn't say exactly.

As I say, those visits prior to April, I—nothing of any importance happened as far as I was concerned.

296 Consenquently I didn't make any notes or any mental notes or any recorded notes of what happened.

Q. Well, what did you go there for? Simply to inspect the premises? A. Our primary purpose was to establish whether anything was going on next door at that time.

Q. On the occasion of your first visit there, did you overhear any sounds in 408 21st Street? A. I don't—I don't recall that, whether we did or not.

We might have heard—it seems to me like that we heard the voice of Mr. Martin over there on a couple of occasions while we were—prior to April, but I couldn't—I couldn't say exactly.

Q. Now, on the first occasion when you brought this exhibit, which has been marked Defendant's No. 2 for identification, did you undertake to find a place where this could be inserted? A. We did, as I recall.

Q. And did you attempt to insert it at a number of places? A. As I recall, we first did some experimenting with a piece of coat hanger up and down the baseboards of the south wall, both in the back room and in the front room.

297 Q. Now, when you used this coat hanger, did you straighten it out so that it— A. Yes, sir.

Q. —became a straight piece of wire? A. So that it would be more like the spike.

Q. And who was it that used the coat hanger? A. Both of us had a piece of coat hanger, both Mr. Bedingfield and myself.

Q. I see. And you probed into the wall of the front room and the back room upstairs? A. That is right.

Q. Is that correct? A. Beneath the baseboard.

Q. Beneath the baseboard? A. That is right.

Q. Did you remove the baseboard? A. No, sir.

Q. And you found a place wherein this could be inserted? Is that correct? A. That is correct.

Q. And would you tell us where that was, sir? A. That was about two feet, I would say, from the front wall on the south wall of 410.

* * * * * * * * * * *

298 Q. * * * Bearing in mind that your drawing shows the length of that front bedroom to be 11 feet 9 inches, would you say it is about two feet back? A. Approximately.

Q. Now, along the wall of this front room, as you probed with your coat hanger, did you find that you could get the maximum insertion at this place, two feet back? A. In fact, that was the only place that we found where the spike would penetrate at all.

Q. I see.

299 Well, is it your testimony, Sergeant Stone, that your spike, which is annexed to Defendant's Exhibit 2, would not penetrate along the south wall of either the front bedroom or the back bedroom at 410 21st Street except at this point two feet from the front wall? A. That is correct, sir.

Q. And the other places you met immediate resistance, is that correct? A. Yes, sir.

Q. Do you know what you were hitting when you were going—attempting to go through at the other spots? A. I would assume that we were hitting a solid masonry wall.

Q. I see.

Now—but at this point you were able to penetrate? A. Yes, sir.

Q. And you penetrated approximately half the length of what has been marked as Defendant's Exhibit— A. I

don't know if this is the tag that belongs on that or not.

Q. 2-A. Is that 2-A? Yes.

Is that right? A. And what was the question?

Q. I say, and you penetrated at the point indicated approximately half of the length of this spike? A.

300 That is correct.

Q. Now, when you penetrated approximately half the length of the spike were you able to tell against what the spike—the tip of the spike was placed? A. I wasn't able to tell. Of course I have some opinions on the matter, but I couldn't tell for sure what the spike was striking.

. . . . . .

301 Q. In the meantime, I will ask you this question, Mr. Stone: Shifting your attention, now, to 410 21st Street, instead of 408, was there a heating register over on this wall at 410? A. There was, sir.

Q. How far back was that, sir? A. I'd say anywhere from 18 inches to 2 foot from the front wall.

Q. And where was that heating register with rela-

302 tionship to the floor? A. I believe that that was immediately above the baseboard, direct, sir.

Q. Yes, sir.

And how high was the baseboard? A. Well, no, I didn't measure that, but I would say it was anywhere from 5 to 8 inches.

I believe that is about the customary width of a baseboard.

Q. And the heating ducts for 410 were in this north wall, right? A. Yes, sir.

. . . . . .

304 Q. So that there will be no misunderstanding, we were talking about a register at 410 being 6 inches up from the floor right over the baseboard and about 18 inches to 2 feet back from the front wall? A. Approximately, yes, sir.

Q. And the register at 408 21st Street was likewise about 18 inches or 2 feet back from the front wall, was it not? A. It looked to be about in the same position.

Q. The same position. And when we say the front wall we mean the wall on 21st Street, right? A. Back from that wall, yes. About 18 or 24 inches back from—

Q. The wall that faces 21st Street. A. That is right.

Q. The front of the house. A. That is right.

Q. Now, do you know, Mr. Stone, whether—there were five of these row houses, were there not? A. There were at least five.

Now, I am not sure on the number of houses.

Q. Let me show you what has been marked as Government's Exhibit No. 1 for identification and see if this refreshes your recollection,—you look at it, any one
305 of these drawings, if you wish—that there were five.

There was the house at 402, 404, 406, 408, and 410. A. Apparently that is correct.

Q. And these houses were all designed and substantially the same way, were they not? A. According to the blue prints, yes, sir.

Q. And they all have their heating ducts in the north wall, do they not? A. Well, now, I don't—I don't believe that the—I don't believe that the blue prints show the location of the heat ducts.

However, the only two houses that I had occasion to be in, which was 408 and 410, the heat ducts were in that location.

Q. Yes, sir.

Now, when you penetrated with your mike you penetrated at the point of the heat duct for 408 21st Street, did you not? A. Possibly, yes, sir.

Q. Well, the fact is you did penetrate? A. Well, I couldn't—I couldn't see what was on the other side at the time that I was penetrating and I would—if you want my opinion on it I can give it to you, but I didn't know.

306 Q. Well, you were looking for that, weren't you?

A. For what is that?

Q. For the heat duct? A. No, sir.

Q. Well, you knew the heat duct was there before you penetrated, didn't you, or you believed it to be there? A. I actually hadn't paid any attention to it to tell you the truth about it, before the time that we found the opening in the wall.

Q. Well, at the time you found the opening in the wall you paid attention to this, didn't you? A. I thought of it, yes, sir.

Q. Yes, sir.

And you thought that you were going in at a point where the duct was, did you not? A. I had an idea that that might be the case.

Q. Yes, sir, and the duct for 408 filled a part of what otherwise would have been the party wall, did it not? A. That's—that's correct. It was in—insefted into the wall.

Q. Yes. And that particular duct was a duct that serviced 408 exclusively, did it not? A. The duct on the south—on the north wall of 408? That is correct.

Q. It was a duct that belonged to the 408 prem-
307 ises? A. That is correct.

Q. Now, did you thereafter ascertain, Mr. Stone, how wide that duct was? A. I don't recall ever measuring the width of the duct, no, sir.

Q. Well, did you not ascertain that the duct was as wide as more than half of the wall or more than half of the wall in width? A. Are you talking about the depth of the duct?

Q. Yes. A. I do recall making a measurement as to the depth of the duct, but I don't recall exactly what it was, but as well as I remember it, it occurred to me at the time that the duct did take up about half of the wall.

Q. Now, when you made that measurement of the duct, Mr. Stone, did you make a record of it? A. I don't recall making any record of the measurement, no, sir.

Q. Well, what is your best recollection of the depth of the duct? A. Well, I'd say from the flush of the wall anywhere from 4 to 6 inches. but I don't recall the exact—the exact measurement.

Q. Do you know whether anyone else in this case made a measurement of the depth of the duct? A. No, sir.

Q. When did you make this measurement of the depth of the duct? A. That I am not too sure of. I might have made the measurement on the day of the raid. I am not too sure.

Q. You mean you made the measurement on April 30, when you were on the premises? A. In fact, I believe that I made that measurement on the premises 410 on a later date. I made the measurement on the depth of the duct at 410.

Q. All right. Now, let's see if we can understand each other. You made the measurement of the duct at 410? A. That is correct.

Q. At a later date than what? A. Than April the 30th.

Q. Than April the 30th? A. That is right, yes, sir.

Q. Well, what was the occasion of your making the measurement of the duct at 410 after April 30? A. We were interested in the depth of the duct.

Now, of course, not having access to 408 after April 30, the next best thing was to measure the duct at 410, and hope that since the houses were built alike that we would get a like measurement.

Q. And that measurement was made, was it not, Sergeant, after a motion was filed in this case seeking to suppress the evidence? A. I don't recall whether a motion had been filed at that time or not.

Q. It was made, was it not, at the instance of Mr. Flannery? A. Mr. Flannery was present at the time.

Q. And the reason that you measured that duct at 410 was because you realized it was relevant to the introduction of the spike into the wall between 408 and 410.

Isn't that so? A. I—we thought that there might be some question about that later and that is why we did measure that.

Q. Now, do you know whether at the time that duct was measured Mr. Flannery, or whomever else was with

you, made a record of the depth of the duct? A. I—to my knowledge, I don't know if any one else did or not, but I do recall measuring the duct myself. And I don't recall the exact depth measurement.

Q. Now, did you secure a set of the heating plans for these premises? A. I never was able to find a set of heating plans for the premises. I had hoped that the original drawings or plans there would show the heating system. But they didn't, and I never was able to get any plans on the heating.

310 Q. Well, did you make an effort to secure the heating plans for these premises before April 21? A. No, sir.

Q. Now, did you conduct any form of investigation or make any examination to ascertain the route that the ducts—the duct took, the register of which was in the upper bedroom of 408 21st Street? A. That I wasn't able to determine.

Q. Now, at the time that you inserted your mike—your spike, the fact of the matter is that you inserted it at the point of the duct, didn't you? A. I inserted it at a point that I estimated to be about two feet from the front wall.

Q. And that was where the duct was, was it, not? A. According to the duct on the inside wall of the room that we were in, that would be about the point where the duct would ordinarily be.

Q. And when you went into the premises of 408 21st Street you found out that there was a duct there just where the duct had been at 410? A. Apparently about the same location, sir.

Q. Did you remove the register at 408 21st Street when you went in there on April 30? A. No, sir.

311 Q. You did not? A. No, sir.

Q. Did you examine in any way behind the register to look at the duct and its condition? A. I don't recall that I did, no, sir.

Q. The duct was made of tin, was it not? A. I believe so.

Q. And when you inserted your spike you inserted it with your thumbs? A. That's about right.

Q. Until you reached a point where you could insert it no further? A. That's correct.

Q. And the fact is you penetrated the duct at 408 21st Street, didn't you? A. Not to my knowledge, no, sir.

Q. Well, couldn't you tell that you were striking tin, Mr. Stone, when you put that in? A. I could tell by pushing it, the mike, into the wall that I was striking something that was solid that stopped the mike, but I couldn't tell exactly what it was.

Q. You knew it wasn't brick, didn't you? A. Well, I couldn't—I couldn't say for sure just what it was.

Q. Oh, you, as an experienced officer who has used these spike mikes before, knew that you weren't running
312 into a brick and mortar resistance, didn't you, when you inserted that? A. I couldn't tell for sure just what I was hitting.

Q. I didn't ask you whether you could tell for sure what you were hitting.

I asked you the question in the negative, namely, weren't you sure that you weren't hitting brick and mortar?

Mr. Flannery: I think he has answered it.

He said, "No."

The Court: Well, let him answer.

The Witness: I couldn't—I couldn't tell or make any estimation as to just what I was hitting, but—

The Court: It didn't—it didn't feel like running right up against a brick wall?

By Mr. Williams:

Q. Now, on one of these occasions, Mr. Stone, when you were in 410 21st Street, before April 21st, you had heard a conversation between Mr. Martin and Mr. Menendez, is that correct? A. I caught some little parts of a conversation, yes, sir.

Q. And where was that conversation taking place? A. Well, part of it was in the—the room, apparently in the

front bedroom of 408, and a part of it transpired while Mr. Menendez was out on the sidewalk knocking on
313 the door, out at the front door.

Q. Did any of the conversation between Mr. Menendez and Mr. Martin take place in the living room downstairs? A. I couldn't—I couldn't say as to that.

So apparently Mr. Martin went downstairs to let Mr. Menendez in, but I couldn't—I couldn't be sure on any conversation that took place during that period.

Q. On this particular occasion were you listening with the ear phones or was Mr. Jewell listening? A. As I recall, Mr. Jewell was not there at the time. It was Mr. Bedingfield and myself. And I can't recall whether we were using the microphone or not at that particular time. I believe that we did have it with us. But I don't recall whether we were using it or not.

Q. Now, let me ask you, Mr. Stone, during the period when you were at four o —410 21st Street, in the latter part of March and during those days in April about which you testified, did you find that the acoustics were better two feet from the front wall by the baseboard than they were back a ways?' A. Well, I—I don't know exactly what you mean.

I have already testified that that is the only point where the spike would insert into the wall, but there was a couple of places further back towards the middle of the
314 wall up higher where one could place their ear to the wall and get fairly good reception.

Q. Now, did you make any effort to move the tip of your microphone after it had been inserted into the wall and had met the point of resistance that you described for us? A. I don't recall. Possibly there—there might have been some moving around to see if it was a small obstruction that could be gone around.

I don't know. I don't remember that detail of the thing, but there is a possibility that we did move the spike around in an effort to try to get by the obstruction that we were hitting.

Q. Now, at any time that you were on the premises at 410 21st Street prior to April 21, did you make a recording of what you heard? A. No, sir.

Q. Did you ever make a recording of what you heard? A. No, sir.

You mean a tape recording?

Q. Yes. A. Or a phonograph recording?

Q. Or a wire recording. A. No, sir.

315 Q. Do you have the equipment for making recordings in your division? A. I believe there would be such equipment available, yes, sir.

Q. Did you ever bring such equipment on the premises? A. No, sir.

Q. Now, when you were on the premises, Mr. Stone, did you make notes of what you were hearing contemporaneously with your hearing? A. I did, sir.

Q. Have you produced those? A. Sir?

Q. Do you have those with you? A. I have those notes. I haven't referred to them, but I do have them.

Q. Do you have them with you here today? A. I do, sir.

Q. Now, were those notes made at the very time that you were listening to the conversations? A. Yes, sir.

Q. And do you recall on what dates those notes were made? A. Well, some were made on April the 21st, on the first observations up there, and some were made on April the 23rd, and some were made on April the 25th.

316 Q. You were not there on April the 22nd? A. No, sir.

* * * * * * * * * * *

317 [Notes were marked Defendant's Exhibit No. 4 for identification.]

* * * * * * * * * * *

318 Q. Now, Officer Stone, these two slips of paper which have been marked Defendants' Exhibit for identification 4 are all the notes that you made during this whole investigation? A. During the investigation covering 408 21st Street.

Q. Covering 408 21st Street these are all the notes that you have as a result of your observations between April the 21st and April 30th? A. That is correct.

Q. And were these notes made simultaneously with the events which they record? A. Yes, sir.

Q. In other words, as you would hear something you would write it down and these are the original notes? A. When I was using the spike I would record it—or the microphone I would record what I was hearing on that, and insofar as my observations were concerned I made the notations of the observations as I went along, as I made the observations.

Q. Now, on April 23rd you were on the premises for some ten hours, weren't you? A. Yes.

Q. Did you use the spike microphone during that— A. I did some. But as to that, Agent Jewell seemed to
319 have a little better ears and he was a little better at using it and catching that conversation on the microphone.

And as a result, he did use the microphone a little more than Agent Bedingfield or myself.

Q. Now, was it difficult to hear these conversations on the microphone? A. It wasn't always easy.

Q. But you could hear them with the naked year against the wall? A. Yes, sir. On occasion. Sometimes the conversation would be loud enough and you could hear it by the naked ear.

Q. But, in any event, for all those days that you were there you made a record of only three telephone calls. Is that right? A. That is right. I was there one day during that period for the purpose of listening, that is.

Q. You were there more than one day, weren't you, Sergeant? A. I said during that period for the purpose of listening.

. . . . . .

321 Q. Now, other than your ear and the electronic device, that is identified in this case as Defense Ex-

hibit 2, did you use any other mechanism for listening purposes? A. No, sir. Except a water glass.

Q. Did you use a water glass? A. I believe that I did use the water glass some on the wall. I wasn't too successful with it myself.

Q. When did you use it? A. It was on the 23rd sometime during that day that I tried the water glass.

Q. Now, did you leave the microphone in the wall from day to day, from April 22nd to April 29th, or did you remove it and bring it back each day? A. Removed it each day.

Q. You inserted it at the same place? A. Approximately, as far as we could determine.

Q. In other words, you made an effort to insert it in the same place because there was only one place it
322 would go through? A. As far as we knew.

Q. As far as you knew? A. Yes, sir.

Q. So each time that the microphone or the spike was inserted insofar as you know it was at the same spot? A. Or near. Now, I don't know—I couldn't say how big the opening in the wall was at that point and I couldn't say, but we—it was near about the same place each time as far as we could determine.

Q. And is that true of the occasions when the spike mike was inserted before April 22nd? A. I would say yes to that. Same place.

Q. Inserted at the same place? A. Yes, as far as I can recall.

Q. Now, did you hear any conversations before April 22nd on the premises at 408 21st Street other than the one that you have described for us? A. It seems to me that, that we did overhear some telephone conversation but I don't remember just what the conversation amounted to.

Q. Do you know who was a party to that conversation? A. As I recall, it was only one person present in the premises at any of those times and that was Mr. Martin.

Q. Well, now, on the occasion when you went over to the premises at 410 on 21st Street and measured the
323 depth of the duct you said Mr. Flannery was with you? A. Yes, sir.

Q. And Mr. Flannery had asked you how you had used this spike mike and he wanted to see how you had used it, didn't he? A. That is the purpose of the trip.

Q. And you showed him, didn't you, that you had inserted it at the point of the heating duct and then he insisted that that be measured, did he not? A. I don't recall at whose suggestion the duct was measured. However, I did insert the, the spike into the wall at the point, apparently the point that we had used on previous occasions and Mr. Flannery was present at the time.

Now, I believe that shortly thereafter I made a measurement of the depth of the duct in that room but I don't know whose suggestion it was.

I don't recall that.

Q. What month was it when this test was made, Mr. Stone? A. I just don't recall that date. It was probably within a month or so after April the 30th. I don't recall the exact time.

Q. Was anyone occupying the premises at the time the test was made— A. There was—
324 Q. —in 408 21st Street? A. At 408?

Q. 408. A. I don't know if anybody was occupying the premises or not. I do know that the lease that Mr. Martin had had not run out at that time.

Q. Well, was anybody present in 408 at the time you ran the test? A. Actually we didn't run any test other than just to insert the microphone into the wall and show Mr. Flannery where it went in.

Q. Now, did Mr. Flannery ask you how far you had inserted the mike in the wall? A. Yes, sir.

Q. What did you tell him? A. I told him it looked like it was between six and seven inches on the spike, that is from the outside of the shoemold or toemold on the outside of the baseboard.

Q. Yes. You told Mr. Flannery, didn't you, that you had inserted it six or seven inches? A. Between six and seven inches, yes, sir.

Q. And you were in court on October 24th, 1958, were you not? A. Yes, sir. What—October? I don't recall that. In court?

325 Q. Yes. October 24th, 1958, in Judge Holtzoff's court. A. Oh, yes, I was here part of the time.

Q. And you heard, did you not, Mr. Flannery say to Judge Holtzoff what you have just said now, that the spike was inserted some six or seven inches? A. That is right.

Q. You didn't undertake to contradict Mr. Flannery on that, did you? A. No, sir.

Q. Nor tell him that he was in error? A. No, sir.

Q. Now, did you ascertain, Mr. Stone, when you got the blueprints from the architect what the construction of the party wall is?

I mean by that, of what material it is made. A. As far as I know it is brick, either brick or cinder block.

Q. Brick. Well, is it brick or cinder block? A. Well, I don't know. I didn't—I didn't determine the actual way the wall is made up of, but apparently it is a masonry wall of some type.

Q. Mortar and cinder block or mortar and brick, you know not which? A. I would say yes.

326 Q. And did you learn that from the architect or the blueprints or from your own examination? A. I didn't learn that from either the blueprint or the examination but I assume, from looking at the building myself and looking at the fire wall on top of the buildings—you can see the fire wall extending above the roof of the buildings between each building.

I assumed that that same masonry wall that you see above the buildings extended right on down the partition between the buildings.

Q. Now, Mr. Stone, your microphone, your spike microphone won't pick up sounds if it is inserted into a solid

masonry wall of brick construction four inches if the wall is ten inches wide, will it? A. I couldn't—I couldn't say to that, sir.

Q. Well, you— A. I have never tried it on a solid wall. I don't know.

Q. Well, you have had experience with this— A. I haven't had that much experience.

Q. Well, you do know, don't you, Mr. Stone, that you can't get sounds through a solid wall of eight inches thickness if you insert this mike four and a half inches, don't you?

Mr. Flannery: The witness says he doesn't know.

327 The Witness: I couldn't testify to that, sir.

The Court: He has answered. He said he can't tell.

By Mr. Williams:

Q. You have never tried that? A. No, sir.

. . . . . .

Cross-Examination

By Mr. Wadden:

. . . . . .

Q. And could you tell us when you first became familiarized with this spike mike that is in this case? A. I would say possibly a year before this date is the first occasion I ever had to try to use a spike mike.

. . . . . .

328 Q. Now, have you had occasion to use this mike at other times during your official investigations? A. On other cases, yes.

Q. And you are familiar with the use of this mike. Is that not true? A. Well, I don't know too much about the technical aspects of the mike, but I do know that it works in some occasions.

. . . . . .

Q. And isn't the secret to this mike, putting it in laymen's language that we can all understand, is this needle; the end of the spike has to be free to pick up the vibrations of sound that flow to it.

Isn't that correct? A. No, sir. No, sir.

Q. All right. Let me ask you this in the alternative. Does it not have to be making a contact with a surface which does pick up the vibrations and transmit them to the needle and into the mike? A. From my knowledge of this particular instrument, which is rather meager, it is my impression that to get the best reception with this instrument the tip of the needle has to be touching something

329 that will act as a sounding board to transmit the sound waves back to the needle.

Q. Well, let me see if I understand you, sir. What you are saying is that the needle should be slightly imbedded in the type of vibrating surface like a plaster wall where you have an air space and another plaster wall.

Is that correct? A. No, I didn't say that.

Mr. Flannery: I object. He didn't say that. There is no premise for that.

The Court: He didn't say that. The objection is sustained.

By Mr. Wadden:

Q. Well, will you explain it to me again then, please, because I didn't understand. A. I said from my knowledge of this instrument it should be in contact—that the point should be in contact with some surface which would act as a sounding board to pick up the sound waves and transmit the sound waves to the needle.

The needle does not have to be imbedded into that object as long as there is contact.

* * * * * * * * * *

330 The Court: I think it ought to be obvious but you may explain it if you can, Mr. Witness.

What do you mean by a "sounding board"?

331 The Witness: Well, I—the only way that I can explain that would be any surface of—presumably and theoretically even a brick wall could act as a sounding board to a certain extent if you engage the brick wall with the tip of the microphone.

No doubt there would be possibly some sound waves coming through and would be transmitted even from a brick wall.

Now, however, there would be more ideal types of surfaces to transmit the sound waves.

By Mr. Wadden:

Q. Is it your testimony that you have never had occasion to use this spike mike in connection with a brick wall? A. That is correct. I never had that occasion before.

Q. And so is it also your testimony that you don't know whether this spike mike would pick up any normal voices when used in connection with a brick wall? A. Other than in this particular case. That is the only thing that I could testify to.

Q. Well, now, calling your attention to this particular case, didn't you have a little added feature to this brick wall in connection with the use of this mike? A. I don't know how you mean.

Q. Well, did you learn that when you all were in

332 the building, you and Mr. Bedingfield and Mr. Jewell, were in 410 in March that either Mr. Jewell or Mr. Bedingfield had heard a conversation that took place in the downstairs living room while listening in the front bedroom on the spike mike?

Did you learn that, sir? A. I don't—I don't recall that conversation. Now, such—such a conversation might have happened. But the things that stand out in my mind most in the matter are the things that I made notes on and some unusual events that occurred.

Of course, I didn't have as much part in this investigation as Mr. Jewell and Mr. Bedingfield did. But there are

some aspects that didn't make too deep an impression possibly on my mind and I don't recall all of the details.

Q. Isn't it a fact, Mr. Stone, that with the reception you got through this spike mike when you were testing it and finally had live voices to test it with, there was no doubt in your mind that the spike mike was making contact with the duct of the heating system in 408? A. I knew that the mike was making contact with something that acted as a very good sounding board but I couldn't tell what it was.

Q. And you certainly knew, did you not, that a brick mortar wall would not produce this kir l of sounding board in and of itself?

333 Isn't that true? A. As I say, I had had no experience with brick walls previous to this case.

Q. Well, Mr. Witness, didn't you just testify, and correct me if I am wrong, that a brick wall might produce some vibrations but it would not produce a good quality vibration? A. I said that it is possible that the brick wall would produce certain vibrations but whether they would produce vibrations—it wouldn't be an ideal sounding board. I believe that that is the way I stated it.

Q. And this mike was doing a fine job for you, wasn't it? It was giving you very good transmission, wasn't it? A. I would say that it did pretty good; yes, sir.

Q. So there is no doubt in your mind, as you testify here today, that this mike was in contact with the duct of the heating system in 408, is there? A. I didn't know that; no, sir.

Q. Well, when did you—you gave Mr. Williams an opinion that this mike was in contact with the duct.

When did you form this opinion that it was in contact with the duct? A. I, I don't believe that I ever have stated to Mr. Williams or to anyone else that I knew

334 that that mike was in contact with any duct.

But I believe that I did state that I had thought of the possibility that that mike was contacting the duct on the other side.

Q. And that is the reason Mr. Flannery wanted it measured for depth.

Isn't that correct? A. I don't recall if Mr. Flannery asked for it to be measured.

Q. Now, you say you made an examination of the duct that is located in the premises at 410 in the front bedroom.

Is that correct? A. Yes.

Q. And would you describe then, please, what your examination of this duct showed?

The Court: Did you take off the register to examine it?

The Witness: No, sir.

The Court: All right.

The Witness: I don't recall—

The Court: Tell us how you did it.

The Witness: I don't recall taking the register off. As I recall, to the best of my knowledge, I stuck a ruler through the slits in the duct, to the back of the duct, to get a measurement on the depth.

335 That is my memory of it.

. . . . . .

Q. Do I understand, sir, that the taking the wall itself as being an eight inch mortar and brick wall, that part of this wall was hollowed out so the duct might be placed within the wall? A. That was apparently the case.

Q. Well, is there any other way that you know it could have been done? A. No. That is about the only way that I could think; that that half of the wall was probably hollowed out so to make room for the duct to be in the wall.

Q. So at this particular place that we are speaking of, and we will call it the "register", in the vicinity right around it, the party wall was, in fact, we will say—can you give me—strike that, Mr. Reporter.

Can you give me your best estimate as to the depth
336 of this duct within the wall? A. I said before, I don't remember exactly. I don't remember the

exact measurement but I would say that it was probably somewhere between four and six inches in depth.

Q. All right. A. But I don't remember the exact measurement.

Q. For the purpose of this question let's strike a happy medium and take five.

All right? A. If that suits you.

Q. Now, is it not true that in the vicinity of the register, that is right around the register itself, the actual thickness of the party wall was three inches rather than eight inches, as has been previously testified to? A. I, I couldn't testify as to the thickness of the wall. However, as I started to say once before, I believe that the District of Columbia Building Codes demand that these party walls be at least eight inches in thickness, a masonry wall where you have a masonry building.

And, as I recall, I did go down to the District Building and checked on that aspect.

Q. Did you place any mark on the floorboard or the floor trim to indicate where you were going to put your spike in, where this hole was? A. No, sir.

337 Q. None whatsoever? A. No, sir.

Q. Now, you testified in answer to a question by Mr. Williams that you knew—you didn't think you were hitting brick when you came to this object.

Isn't that correct? A. It didn't feel like a brick wall; no, sir.

Q. What did it feel like, to the best of your memory? A. Well, there was a slight, slight bit of give. A slight give, before it stopped.

* * * * * * * * * * *

Redirect Examination

Mr. Flannery:

Q. Did your spike hit a solid object? A. It was solid, yes.

Q. All right. Now, after it hit that solid object did you proceed to press it further so that it would penetrate the solid object? A. No, sir. These needles are rather delicate instruments and I had been cautioned on the use of
338 them: They are rather expensive, too.

That entire outfit there will run something better than $400 and I don't want to damage it by trying to force it into a brick wall or any other impenetrable surface.

Q. I see. Now, then I believe you testified to this but if you haven't, let me ask you again:

How far did you estimate that the spike went into the wall? A. Well, counting the toemold and the baseboard, which figures up to be an inch and a half collectively, it was somewhere between six and seven inches that I recall the measurement.

Possibly six and a half inches.

Q. Of the spike? A. Yes, sir.

* * * * * * * * * *

340 **Jack E. Lockhart**

was called as a witness by the United States, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

Direct Examination

By Mr. Flannery:

* * * * * * * * * *

Q. Very well. Now, on April the 30th, 1958, did you have occasion to participate with other officers in a raid at 408 21st Street, Northwest? A. I did.

* * * * * * * * * *

341 Q. Very well. Now, when you arrived there what is the first thing that you did? A. I arrived in the area, driving the cruiser; parked the cruiser across the street and saw other officers had gained entrance to premises 408 21st Street.

And I went to 408 21st Street, Northwest, and entered the premises and then went upstairs to the second floor to the front bedroom.

Q. And when you got to the front bedroom of that place what did you do and what did you see? A. I saw the defendants, Martin and Schwartz, present. And I began a search of the room and I searched a coat in the closet of that room and this coat was identified as belonging to the defendant, Martin.

Q. Who identified it as belonging to Martin? A. The defendant Martin identified that coat as being his.

. . . . . .

Q. And what, if anything, did you discover? A. I got from the coat a Potomac Electric Power Company
342 bill.

. . . . . .

(Thereupon a document identified as a PEPCo bill was marked by the Deputy Clerk as Government's Exhibit No. 9 for identification.)

. . . . . .

Q. Now, Sergeant Lockhart, I will show you Government's Exhibit 9 for identification.

Is this the Potomac Electric Power Company bill which you recovered from Martin's coat? A. This is the bill.

Q. How do you identify it? A. I identify this by the words, in my handwriting, "Martin's coat, closet, front room, second floor", by my initials, J.E.L., and the date, 4/30/58.

Q. All right.

Mr. Flannery: Your Honor, I offer into evidence Government's Exhibit 9 for identification.

The Court: Is there the same overall objection?

Mr. Wadden: The same overall objection, your Honor.

343 The Court: All right. It may be marked in evidence. The objection is overruled.

The Deputy Clerk: Government's Exhibit 9.

(Thereupon the document heretofore marked as Government's Exhibit No. 9 for identification was received in evidence.)

. . . . . .

Q. Now, then Sergeant Lockhart, what else did you do? A. I searched the defendants, Meyer Schwartz and Robert Martin and I recovered from them—from each of them two keys.

And with them I used the keys in the door of the bedroom on the second floor and each of them had one key which fit that door and each of them also had a key which fit the front door of the house.

Q. All right.

Mr. Williams: Your Honor, may it be recorded,
344 for the purpose of this witness, that our objection runs to this whole line of testimony on the constitutional grounds—

The Court: The record may show that and your objection is overruled.

. . . . . .

(Thereupon two keys were marked by the Deputy Clerk, respectively, Government's Exhibits No. 10-A and No. 10-B, for identification.)

(Thereupon two keys were marked by the Deputy Clerk, respectively, Government's Exhibits No. 11-A and No. 11-B, for identification.)

. . . . . .

Mr. Williams: We have the same objection to these, your Honor.

The Court: Overruled.

By Mr. Flannery:

Q. Now, Sergeant Lockhart, I will show you these two keys which have been marked as Government's Exhibits 10-A and 10-B for identification.

345 Can you identify those two keys? A. Yes, sir, I can identify these keys.

Q. All right. Will you state what they are? A. They are two keys, one that fits the upstairs second floor door to the bedroom and one fits the front door of the house.

And I can identify these by a tag which I have attached to the keys and the tag has the writing on it, in my handwriting, "Robert L. Martin, 1500 Massachusetts Avenue, Northwest, No. 840", and the date, 4/30/58, with my name, Corporal J. E. Lockhart, morals division.

Q. And those are the two keys which you recovered from Martin as you have testified? A. I recovered these keys from Martin. I have scratched on one key here. I marked on the back of the card "key to the front door marked by D", and I have the D marked on this one key.

This is the key that fits the front door and this is the key to the second floor.

Q. And when you refer to key fitting the second floor door which door do you mean on the second floor? A. That is the door to the front bedroom on the second floor.

Q. I show you S-B for identification, this picture.

I call your attention to that door. Is that the
346 door? A. This is the door.

Q. And that is the door at the top of the steps on the second floor as you enter the apartment.

Is that right? A. That is right.

Q. All right. Now, I will hand you what has been marked for identification—what have been marked as Government's 11-A and 11-B.

Will you look at those and tell me whether you can identify them? A. I can identify them.

Q. What are those two keys, sir? A. These two keys—the one key that's marked with a D is a key to the front door of premises 408 21st Street, Northwest, Washington, D. C.

And the other key is the key to the door to the bedroom on the second floor, to the front bedroom on the

second floor, and these keys are tagged with a tag which I attached myself, in my handwriting, the name "Meyer Schwartz, 2129 Walton Avenue, Pittsburgh", and the date, 4/30/58.

And I have my name on it, Corporal J. E. Lockhart, morals division.

Q. And you recovered those from the defendant, Schwartz? A. I recovered these from the defendant, Schwartz.

347 Q. Very well. When you refer to the front bedroom door you mean that door at the top of the steps as you enter the apartment? A. That is right.

Mr. Flannery: Your Honor, I wish to offer into evidence these Exhibits 10-A, 10-B, 11-A and 11-B for identification.

The Court: They may be marked as in evidence over the objection that has already been made.

. . . . . .

(Thereupon each sheet of a group of paper writings was marked by the Deputy Clerk as Government's Exhibits No. 12 through No. 12-M, respectively, for identification.)

. . . . . .

351 Q. Now Corporal Lockhart, I will show you this clip board and these yellow sheets of paper which were attached to it which I have just loosened here. I direct your attention to this yellow sheet of paper marked for the record as Government Exhibit 12 for Identification, can you identify that? A. I can identify this sheet of paper.

352 Q. All right now where did you first see that sheet of paper? A. I saw this on top of the cabinet in the front bedroom of the second floor of the premises 408 Twenty-first Street.

Q. When you saw that sheet of paper did you see other sheets of paper? A. I did.

Q. All right, I will show you Government Exhibit 12A for Identification, was that particular exhibit with number 12 for identification? A. It was.

Q. I show you Government 12B for Identification. Was that with 12? A. It was.

Q. I show you Government Exhibit 12C for Identification, was that with it also? A. Yes, sir.

Q. 12D for identification? A. Yes, sir.

Q. And finally 12E for Identification, was that with the top sheet? A. Yes, sir.

Q. Where did you recover those? A. From the top of the cabinet in the front bedroom on second floor on the premises of 408 Twenty-first Street.

353 The Court: Were they on that clip board?

The Witness: They were.

Mr. Flannery: And will you mark this clip board Government Exhibit 12N for Identification.

(Document marked Government 12N for Identification.)

Your Honor, at this time I wish to offer into evidence the clip board which is Government 12N for Identification and also these yellow sheets of paper known for the record as Governments 12, 12A, 12B, 12C and 12D, and 12E for Identification.

The Court: The general objection that has been made to the admission of the sheets is overruled and they will be received in evidence.

(Government 12 through 12E admitted in evidence and 12N also.)

Mr. Flannery: And at this time, Your Honor, may I read aloud Government Exhibit 12.

The Court: You may.

. . . . . .

355 Cross-Examination

By Mr. Williams:

. . . . . .

357 Redirect (resumed)

By Mr. Flannery:

Q. While you were in the premises did the phones ring? A. Yes, sir.

Q. Just answer this yes or no for the moment. Did you answer any of those phones? A. Yes, sir.

Q. When you answered the phones did you impersonate the voice of the intended receiver of the call? A. I did not.

Q. Did you make notes of any calls that you took over the phones that were ringing? A. Yes, sir, I did.

. . . . . .

Recross Examination

By Mr. Williams:

. . . . . .

358 Redirect . . .

By Mr. Flannery:

Q. What time was the first call? A. About 5:50 P. M. I received a telephone call over one of the phones and the person on the other end—I answered hello and the person said, I would like to speak to Meyer and I said, he isn't here, he is busy and then he says, well, let me speak to Jules and I said, well I can't let you do that either and about that time they hung up.

Q. Did you answer any other calls? A. About
359 two minutes later another phone call came in and I answered the telephone and the person asked for Jules and I said, I told him he wasn't available and the person hung up.

Q. Did you receive any other calls? A. Yes, I did. About one minute later I received another call, the person asked for Jules and I said, he isn't available and he says, let me speak to Bob, and I said, he isn't available either and then the person hung up.

Q. Did you answer the phone any more? A. Another phone call came in just a few minutes later and the person wanted the line on one of the ball games.

Q. The line on the ball game? A. Yes, sir.

Q. What did you do? A. I told him, I looked down at the sheet and there I saw the name Score and one of the other pitchers for Washington and I gave him the names of two pitchers and said, 35 45 which I had seen written down on a sheet of paper and at that time he hung up the telephone.

Q. I show you Government Exhibit 3 for Identification. This has been described as a line. Is that what you looked at or did you look at something similar to that? A. I believe this is the sheet. I see the name Score and Ramos 35 45. Those are the figures I used.

Q. Did you answer the phone at any other time?
360 A. Yes, I did. I received a similar call a few minutes later and somebody asked for the odds on the fight.

Q. And what did you do when they asked that? A. I started to say something and they hung up the telephone.

Q. Did you pick up the phone any more? A. One other time, there was six phone calls altogether. One time a person asked for Jules again.

Q. Did you engage in any conversation with that individual? A. No.

Q. Was that about all? A. That was it.

The Court: Now ladies and gentlemen this evidence is merely being introduced and permitted to be introduced solely to show the nature of the premises and for no other purpose.

. . . . . .

Friday, March 20, 1959.

377 **John J. McCarthy**

was called as a witness by the government, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

Direct Examination

By Mr. Flannery:

Q. Mr. McCarthy, where are you employed? A. I am associated with the firm of Woodward and Norris as vice president.

We are located at 723 20th Street, Northwest.

Q. Now then, I call your attention to March of 1958. Did there come a time when Inspector John Layton of the Metropolitan Police Force came to see you?

378 A. Yes, he did.

Q. Approximately when was that? A. About the 15th of March.

Q. Very well. Did he want to see someone? A. Yes. He came in to see Mr. Norris who is president of our firm, and in his absence he talked with me.

Q. Very well.

Now, did Inspector Layton tell you what he wanted? A. Inspector Layton asked—we had a vacant house at 410 21st Street, Northwest—

Q. In the District of Columbia? A. In the District of Columbia—which was for sale.

And he asked if he may have a key to make some observations from that house in that neighborhood.

Q. Very well.

And what did you say to him? A. I told him I would have to discuss it with Mr. Norris, and then when Mr.

Norris returned to the office we discussed it and Mr. Norris agreed that it was perfectly all right for me to give Inspector Layton a key.

379 Q. Very well.

Now, as a result of your conversation with Mr. Norris did you then contact Inspector Layton? A. Yes, I called Inspector Layton at his office and told him that he may come in and pick up a key for 410 21st Street.

Q. Very well. And did you give the right to the Inspector to have men under him use the premises also? A. Yes.

Q. All right.

Now, as of March and April, 1958, who owned premises 410 21st Street? A. 410 21st Street was owned by our firm, Woodward and Norris.

* * * * * * * * * * *

382 **William D. Foran**

was called as a witness by the Government, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

Direct Examination

By Mr. Flannery:

* * * * * * * * * * *

Q. Did you, on that day, namely, April the 30, 1958, assist in the execution of certain arrest warrants and a search warrant for premises 408 21st Street, Northwest? A. I did, sir.

383 Q. And that is in the District of Columbia? A. It is, sir.

Q. Very well.

Now, on April the 30th, 1958, at what time did you go to 408 21st Street, Northwest? A. About 5:20 p.m., in the afternoon.

Q. Very well.

Now, did you go there with other police officers? A. Yes.

I had observed defendant Silverman leave the front door of premises 408 21st Street, and—

Q. Well, before we get to that, who did you go there with? A. Well, Officer Stone and I went to the vicinity of the three hundred block of 21st Street, arriving there at somewhere in the neighborhood of 5:00 o'clock.

We met Agent Bedingfield at that location.

It is roughly opposite the State Department, entrance to the State Department Building, in that block.

And we conversed with Agent Bedingfield, and shortly after we arrived there Inspector Layton and Sergeant Lockhart came on the scene.

They came up in a different cruiser than we had come in.

And we were standing there talking at the time I observed defendant Silverman leave the front door
384 of premises 408 21st Street.

Q. All right.

Now, do you see Silverman here today? A. I do, sir.

Q. Where is he? A. Sitting over here just back of Mr. Wadden.

Q. All right.

Now, when you saw the defendant Silverman come out of 408 21st Street, just where did you go and what did you do? A. Silverman started crossing 21st Street in an eastward direction.

I started running north on 21st Street from the three hundred block.

I overtook defendant Silverman on a paved portion of a parking lot which was opposite 408 21st Street, and alongside a building that was designated 419 21st Street.

I identified myself by exhibiting my police badge, notifying the defendant that he was under arrest under authority of an arrest warrant for gambling violations.

Q. Did you have the warrant? A. I had three arrest warrants and a search warrant for premises 408 21st Street.

Q. And included in the arrest warrants was the
385 arrest warrant for Silverman? A. That is correct.

Q. And who were the other arrest warrants for? A. They were identified at the time as John Does.

Q. And who were they? A. One was defendant Schwartz, and the other was defendant Martin.

Q. All right.

Now then, to go back to where you apprehended Silverman, after you notified him who you were and that you had an arrest warrant, what did you do next? A. I then took him to the steps of 408 21st Street and began to search him.

He asked me what I was looking for.

I stated I was looking for the keys to the premises.

He then reached inside his coat pocket, his inside coat pocket, and took out a key ring with several keys on it and handed it to me.

I started to examine the keys and he asked me what I was looking for.

I said, "I am looking for the key to the door."

He said, "Just a moment."

He took the key ring, picked out the key that fit the front door of the premises, unlocked the door, and at that point we made our entry.

386 I had told him prior to his unlocking the door that we had a search warrant for the premises for gambling violations.

Q. All right.

Now, as you made your entry, did you take Silverman with you? A. I did, sir.

Officer Stone and myself entered the premises about the same time with defendant Silverman.

I was keeping him in front of me at the time.

Of course, by this time Inspector Layton, Sergeant Lockhart and Agent Bedingfield had come to the door and were directly behind us.

Q. All right.

Then what did Detective Stone do? A. After getting inside, Detective Stone ran up the steps.

I turned defendant Silverman over to Inspector Layton and I ran up the steps shortly after Detective Stone did.

Q. All right.

Now then, as you ran up the steps, then, what did you do? A. I got in the room, as I say, shortly after Detective Stone, and defendants Schwartz and
387 Martin were in that room.

And I then exhibited my badge again, and announced that we had arrest warrants and search warrant for gambling violations.

Q. Very well.

Mr. Williams: Your Honor, for the purposes of the record, may I say that we have a continuing objection to this line of testimony—

The Court: The record may so show.

Mr. Williams: —without interrupting Mr. Flannery?

The Court: And the objection is overruled.

[Two keys were marked Government's Exhibits 13-A and 13-B for identification.]

The Deputy Clerk: Government's Exhibits 13-A and B for identification.

[Thereupon, Mr. Flannery submitted the aforementioned exhibits to defense counsel.]

Mr. Williams: I have the same objection, Your Honor, to these, as I have heretofore noted.

The Court: Overruled.

By Mr. Flannery:

Q. Now then, Lieutenant Foran, I will show you this key which is marked for the record as No. 13-A for identification.

388 Can you identify that? A. This is a key that was on the key ring that I spoke of a moment ago which fit the front door of premises 408 21st Street, North-

west, and this is the key that the defendant Silverman unlocked the front door with.

Q. All right.

Now, I will show you another key, No. 13-B for identification.

Can you identify that? A. Yes. This is a key which fit a special lock on the door to the room in which the office was set up in. This key also came from the same ring that that key that I spoke of there came from.

Q. I will show you Government's Exhibit 8-B for identification, a picture showing a door and a view from what appears to be a hallway into a room.

Does that picture show the door to which that key fit? A. Yes. If you notice, above the door knob here there is an object that you can see on the surface of that door and that is the outer ring to that lock, which is located on the inside of the door.

Q. All right.

Mr. Flannery: Now, Your Honor, at this time I wish to offer into evidence these two keys, 13-A and 13-B
389 for identification.

The Court: They may be marked in evidence subject, of course, to the objection that has been made by counsel for the defense.

The Deputy Clerk: Government's Exhibit 13-A and B.

[Government's Exhibits 13-A and 13-B were received in evidence.]

By Mr. Flannery:

Q. Now, Lieutenant Foran, I believe you have testified so far that you entered this door and you saw the defendants Schwartz and Martin. A. They were in the room on the second floor, yes, sir. The front room.

Q. Now, in what position were they when you first entered that door? A. By the time I got there both of the men were on their feet.

Q. I see.

Now, then, will you describe what you saw as you entered the room, in addition to the two men? A. Well, upon my first entry I stayed there a very short period of time to make sure that Officer Stone had the situation under control up there and, of course, by this time Sergeant Lockhart had come up.

Upon my first entry I just observed the general
390 situation there.

There was the tables with the telephones on them and a couple of objects which I saw there, baseball line sheets that I saw at that time.

I then went back downstairs, leaving Sergeant Lockhart and Detective Stone with those two defendants.

I went back downstairs. And then I searched the person of defendant Silverman.

. . . . . .

[A paper writing was marked Government's Exhibit No. 14 for identification.]

. . . . . .

Q. Lieutenant Foran, I wish to show you at this time what has been marked for identification as Government's Exhibit No. 14.

Can you identify that? A. Yes. This is a slip of paper that I took from defendant Silverman's left suit coat pocket.

I identify it by the notation of the defendant's name on the slip and the location from his person, where I
391 seized this slip?

I have the time, 5:25 p.m., and the date, 4-30-58, and my initials.

And this slip has a list of names or codes with figures alongside them.

Mr. Flannery: Your Honor, at this time I wish to offer into evidence Government's Exhibit 14 for identification.

Mr. Williams: The same objection.

The Court: Over the objection of counsel, it may be received.

. . . . . .

[At the bench:]

Mr. Williams: I want to ask Mr. Flannery first, before —in support of which count is this being offered, Mr. Flannery, because that will determine whether or not I have an objection.

Mr. Flannery: Well, in support of all the counts, I suppose.

Certainly it is a violation of the first count, 392 possession of a record used in a gambling operation.

Mr. Williams: That is why I want to object, because I don't think it will support that inference.

This isn't a patently—on its face—a gambling record. It isn't a record of a bet. It is a list of names, but beyond that—

Mr. Flannery: I will connect it up.

As of now all of these documents that have gone in are just pieces of paper with writing on them, but at the proper time I will have an expert tell the jury what they are.

The Court: Well, pending that time you can reserve your objection on a motion to strike it all.

Mr. Williams: Subject to connection.

The Court: Oh, yes.

Mr. Flannery: Sure.

[In open court:]

By Mr. Flannery:

Q. Now, Lieutenant Foran, there came a time when you went back to the room, is that correct? A. That is correct, sir.

Q. Now, I wish to hand you Government's Exhibit 8, that photograph there.

Does that depict part of what you saw in that
393 room about which you have testified? A. Yes.

This is the general condition of the room when I first entered it.

Q. I see.

Now, I show you this picture, S-C, for identification.

Does that show part of the room about which you have been testifying? A. Yes.

This shows the east wall of that room.

You will notice that this—this is the left front of the east wall.

You have this black cloth, that is over a window. And you have the air conditioner there.

And then over on this side there was another window that was also blinded with the black cloth.

And, of course, the bed setting here against the north wall.

And then you can see here the waste baskets, and then the perforated tray which had been used to burn certain objects in, sitting on top of a waste basket.

Q. Yes. Was anything in that tray or grate?

A. There were some charred ruins in the waste
394 basket, and some other items.

I don't recall exactly what was in there.

. . . . . .

[Tray was marked Government's Exhibit No. 15 for identification.]

. . . . . .

Q. Now then, Lieutenant Foran, I will show you what has been marked as Government's Exhibit 15.

Can you identify that? A. Yes.

This is the perforated metal basket that I spoke of being situated over a trash can in the second floor front room of premises 408 21st Street, Northwest.

And even now, it still has some evidence of paper being burned in it, as ashes there.

. . . . . .

Mr. Flannery: Your Honor, at this time I wish to offer into evidence Government's Exhibit 15 for identification.

The Court: It may be marked in evidence over
395 the objection of counsel for the defense.

. . . . . .

By Mr. Flannery:

Q. I will ask you, if you will, to look at the contents of this box.

Can you identify them? A. Now, this bag here, I identify by my initials, being from Table No. 2, and the date and my initials.

These are clip boards with paper attached.

There is pencils and paper clips and one thing and another in there.

Mr. Williams: I think this material ought to be offered in evidence, Your Honor,—

Mr. Flannery: I am going to mark it now.

Mr. Williams: —if it is going to be shown.

I don't know what is material here and what isn't.

It appears to me to be a lot of pencils and unused pads and unused note books and magazines.

. . . . . .

396 [A bag and its contents were marked Government's Exhibit No. 16 for identification.]

Mr. Flannery: Your Honor, at this time I wish to offer into evidence Government's Exhibit 16, which consists of this brown bag containing two clip boards and blank white papers attached thereto.

The Court: Your over-all objection runs to this, Mr. Williams?

Mr. Williams: Yes, sir.

The Court: Overruled.

It may be received.

. . . . . .

[Brown bag and its contents were marked Government's Exhibit No. 16-A for identification.]

397 By Mr. Flannery:

Q. Now, Sergeant, what is 16-A for identification? A. 16-A is a bag containing a pencil sharpener which was mounted on the table, some pencils down in the bag, a quantity of three by five pads, plain paper pads.

We have here a "Dee Cee Diner." It looks like an advertisement, baseball schedule book. In other words, the schedule of baseball games to be played, apparently, put out by the Dee Cee Diner.

And we have the pamphlet, "Weekly Boxing World," and that is dated April the 28th, 1958.

Q. The rest of those books and paper— A. These are all the same.

Well, no, they are not all the same, either. It appears to be different dates. April the 7th, April the 14th, April the 21st, March the 31st.

Q. All right. A. And, of course, here we have a quantity of pads which resemble pads that were used to make up the baseball line.

And then, of course, you do have some indications on this one here with recordings. I recognize a couple of the names there as being those of baseball players, pitchers.

And we have a magazine here dealing with baseball. It is labelled with a 1958 date showing on it.

398 Then a clip board with a quantity of sheets of perforated paper on it.

Q. All right, thank you, Lieutenant. You may resume your seat.

[Witness resumed the witness stand.]

Mr. Flannery: Your Honor, may I offer into evidence 16-A for identification, consisting of this brown bag?

The Court: Your general objection runs to that. It will be overruled and it may be received in evidence.

. . . . . .

Q. Now then, did you notice telephones in this room? A. Yes, there were three telephones located on the two tables that I described as being in that room, District 7-3554, District 7-3555, District 7-3556.

Q. Did you take those telephones into your custody at that time? A. I did seize those phones and I listed them on the search warrant.

Q. And did there come a time when you did
399 something with those telephones? A. Yes, they were turned in to the property clerk and subsequently to the C and P Telephone Company.

Q. Now then, Lieutenant Foran, did you help to execute this search warrant and to inventory the property? A. I actually executed the search warrant as such by making the notations on the search warrant itself.

And, of course, the property, to some degree I examined it on the premises, but there were some articles that were physically taken by other officers in my presence there.

Q. All right.

Now, approximately how long did it take to execute the search warrant? A. Well, we were answering telephones for a lengthy part of the time we were in the premises.

As a matter of fact, we had to finally disconnect the phones so that we could go ahead and finish up our business there and—

Q. Were the phones ringing continually? A. They were all the time we were there.

Q. Now then, so—

Mr. Williams: I don't think that was responsive to Mr. Flannery's question, Your Honor.

He asked the witness, as I recall the question, how long
400 did it take to execute the search warrant, and he told us about some phones which were ringing, but I don't think we still know how long it took to execute the search warrant.

Mr. Flannery:

By Mr. Flannery:

Q. How long did it take to execute the search warrant? A. We left the premises at 7:45 p.m., on that day.

Q. All right.

And was that time spent in—spent in executing the warrant and gathering the evidence together? A. It was combined with the answering of the telephones.

Q. All right.

Now then, did you answer any of those telephone calls?

. . . . . .

A. Yes, I did.

Q. . . .

And when you picked up a phone did you at any time ever impersonate the intended receiver of the call? A. No, I didn't impersonate anyone at the premises there, no, sir.

Q. . . .

401 Now then, when did you first pick up a phone and hear anything? A. Well now, I don't know when I first picked up the phone.

I answered the phones on many occasions up there.

I made notes of three particular calls that I received.

For the most part, people calling would recognize right away that they weren't talking to someone that they knew and they wouldn't talk to you, just ask for somebody and say they are busy, and they would hang up on you.

Q. All right now, as to the three calls about which you made notes.

With reference to the first call, what happened or what did you hear when you picked up the phone? A. Well now, on one call I received it about 6:55 p.m., a male voice identified himself as Lew M, M as in Mary, and asked for Meyer, Bob or Julius, and I said they were busy and he hung up.

Mr. Wadden: Your Honor, for the purpose of the

record we have the same objection previously made with reference to the telephone conversations.

The Court: Overruled.

By Mr. Flannery:

Q. I show you Government's Exhibit 5 for identification, a sheet of white paper containing what appear
402 to be a list of names and numbers on both sides of it.

Do you see the name Lew M on that sheet? A. Yes, right here is the indication, notation, Lew M as in Mary, capital M, and the figure 65 beside it.

Q. Now, have you told us all that transpired on that call? A. On that call?

As I said, I told him they were busy and he hung up on me.

Q. • • •

Now then, was there another call about which you made a note? A. Yes, about 7:10 p.m., I made a note relative to a call I received from a male voice who identified himself as George.

He asked for Meyer.

I told him that Meyer was busy.

He started to discuss the games and the odds and so forth and I took three bets from him on three of the games that day.

Q. • • •

Now, was there another call about which you made a note? A. There was another call that I received
403 that I remembered particularly.

It was a call from a male voice, stating that he wanted to place a thousand dollar bet on Bowdry, that Bowdry was a participant in a fight that was to be held that night between another fighter—between Bowdry and another fighter known as Hinnant.

Anyway, I talked to this fellow for a few moments and from the manner in which he expressed himself, why, I

felt that he probably was aware that the police were in that premises because I asked him what his name was and he said, "You s.o.b., you are trying to catch everybody," and so then I hung up on him.

. . . . . .

By Mr. Williams:

. . . . . .

408 [At the bench:]

Mr. Flannery: Inspector Layton just went upstairs. There are several projectors up in my office which I plan to use to put certain of this evidence on a screen, and if Your Honor would recess for just a few minutes, I believe he will be back.

. . . . . .

410 The Court: I take it you have an objection before the jury comes in.

Mr. Williams: Yes, Your Honor.

I understand counsel plans through his next witness to take some exhibits which are already in evidence and have been identified by previous witnesses, and put them side by side on a still picture screen.

I object, Your Honor, because I think it has a tendency to magnify certain evidence out of proportion with other evidence. They are not going to do this with all of the exhibits but certain ones of the exhibits and I think it becomes rather obvious in the illustration of evidence—

The Court: It may be illustrative of something.

Mr. Williams: —that counsel has not interded he is offering it for that purpose. As I understand it he is going to take certain tickets which have been offered in evidence and which Your Honor has admitted and use this motion picture or still picture process, to show those on the screen.

The Court: To interpret for the jury?

Mr. Flannery: Yes, Your Honor.

The Court: You are making the same objection?

Mr. Wadden: And I am making a further objection, Your Honor. We have in this case five counts,
411 I believe. Two under 1502, which is possession; one under 1504, which is setting up; one under 1505, which is maintaining the premises; and one under 1508, which is taking a bet.

I think counsel, Your Honor, should tell the Court and the Court should rule under which count he is putting this evidence in because it certainly isn't applicable to all of the counts.

The Court: What do you say to that?

Mr. Flannery: I think it is applicable to all of the counts, they are records of bets.

The Court: They are all applicable?

Mr. Flannery: Yes, Your Honor.

Mr. Wadden: Your Honor, a record of a bet is not in evidence and there is no evidence whatsoever of setting up a gaming table.

The Court: I will overrule your objection. You may proceed, Mr. Flannery.

* * * * * * * * * * *

412 Q. Where are you employed, Inspector Layton? A. The Metropolitan Police Department.

Q. What is your rank? A. Inspector.

Q. Now, how long have you been a member of the Metropolitan Police Department? A. Since 1936.

Q. What is your present assignment? A. I am in charge of the Gambling and Liquor Squadron.

Q. Were you so employed on April 30, 1958? A. I was.

Q. Now Inspector Layton, directing your attention to the date, namely April 30, 1958, did you assist in a raid on the premises of 408 Twenty-first Street, Northwest? A. I did, I supervised that raid.

Q. Very well. That is in the District of Columbia? A. That is correct, sir.

Q. Now Inspector Layton, what time did you first go to the area of that address on April 30, 1958? A. I ar-

413 rived in the vicinity of 408 Twenty-first Street just about five o'clock P.M.

Q. Very well. Then what did you do after you arrived in that area? A. I held some discussion with Lieutenant Foran and Agent Bedingfield and after that discussion there, rather during the time we were holding that discussion the defendant Silverman was seen to leave the premises.

At that time I directed Lieutenant Foran to follow the defendant Silverman and place him under arrest. The rest of the officers, at my direction, proceeded also to the vicinity of 408 Twenty-first Street and after Defendant Silverman's arrest, we entered the premises.

Q. Very well. When you entered the premises what did you see? A. I entered the front door on the first floor. The Defendant Silverman, at that time was in the custody of Lieutenant Foran. I stayed with Defendant Silverman on the first floor in the back room while the other officers went to the second floor.

Q. Very well. Did there come a time when you went to the second floor? A. There did.

Q. Very well. What did you see when you went
414 to the second floor? A. On the second floor immediately to the right alongside the wall on the right hand side of the room, entering the room, were two tables, three telephones, pads of paper, and a filing cabinet was also against the front wall of the room.

A small cot was on the left side of the room and in the center of the room was a trash basket on which was set up a tray of a type that was metal and was made of perforated metal.

Q. Showing you Government Exhibit 15 for Identification, does this resemble the tray to which you have just referred in your testimony? A. It does.

Q. Now then, did you assist in the execution of the search warrant for those premises? A. I did. The execution of the search warrant was done under my supervision.

Q. Very well, and how long did it take to execute the search warrant? A. We entered the premises at about 5:30 and left in the neighborhood of 7:30 that evening, about two hours.

Q. Now then,

Mr. Williams: Your Honor I think that answer is not responsive to the question. The question was, how long did it take to execute the search warrant, not how long he was there.

415 The Court: Do you mean to state from the time you entered all that time was spent in executing the warrant?

The Witness: That is correct.

The Court: Overruled.

By Mr. Flannery:

Q. Inspector Layton, will you tell His Honor and the jury, how long you have been connected with the Gambling Squadron of the Metropolitan Police Department in one capacity or another? A. I was first assigned in charge of the Gambling and Liquor Squadron in October 1953 and I had a tour of duty as commanding officer of the First Precinct and then returned to command the Gambling and Liquor Squadron on November 1, 1957.

Q. Very well. Now, in the course of your duties with that Squadron have you had occasion to investigate or supervise the investigation of gambling activities or various types in the District of Columbia? A. I have, sir.

Q. Are you familiar with the appearance of a gambling set up which takes bets on baseball games and prize fights? A. I am, sir.

Q. Very well. Now you are familiar with out that operates? A. I am.

Q. Very well. Now then Inspector Layton, what
416 is a line with respect to this particular type of operation? A. The line as it is referred to is an accounting, a list or record of the odds that are quoted by

book makers and sporting agents such as baseball games and prize fights.

Mr. Flannery: Now, Your Honor, at this time I submit, Inspector Layton, in view of his wide experience in gambling and supervision of gambling activities, is qualified as an expert and I propose with the Court's permission, to show some exhibits and ask him certain questions about them.

The Court: I suppose your objection remains the same, does it not, Mr. Williams?

Mr. Williams: Yes, sir.

The Court: Overruled.

By Mr. Flannery:

Q. Now then Inspector Layton, I hand you what has been marked Government Exhibit 3 for Identification, have you seen that before? A. I have, sir.

Q. I hand you also Government Exhibit 4 for Identification and ask you, have you seen that before? A. I have.

Q. Now, in your opinion, Inspector Layton, what is Government Exhibit 3 for Identification? A. Government Exhibit 3 is what is ordinarily known as a line sheet.

417 Q. Very well. Now did you, pursuant to a request from me, have made under your supervision, photographs of one of these exhibits? A. I did, sir.

Q. Which one was that? A. It was this exhibit here.

Q. Three? A. Three.

Q. How many of those photographs did you have made? A. I have four prints.

. . . . . .

(Documents 2A through 2S marked Government Exhibits for Identification.)

By Mr. Flannery:

Q. Now Inspector Layton, at this time I wish to hand to you what has been introduced in evidence as Government Exhibit 2 consisting of these fifty-five slips of

418 white paper with certain notations on them, and

which for the record, are now known as Government Exhibits 2, which include the fifty-five slips and also some twenty of the slips for the record, are now marked Government Exhibits 2A through S.

Now I hand you this pack of some fifty-five slips and ask you, sir, have you ever seen them before? A. I have, sir.

Q. Have you examined them? A. I have.

Q. In your opinion what are those fifty-five slips? A. These slips are bid slips and represent bids that have been accepted on various baseball games that were played on April 30, and two slips on which were recorded bids that were accepted on a prize fight.

Q. All right. Now, have you made a list of the total amount involved in those bids? A. I have, sir.

Q. How much money is involved in those slips? A. A tally of the total amount of bids is $42,600.00. However, there is a notation on one of the slips indicating that one bid for $4,650.00 was canceled which would leave a total of the amount of bids as accepted as represented in these slips $37,950.00.

Q. And in your opinion does that comprise a com-
419 plete day's work for April 30, 1958? A. It does not for this particular operation. On this date there were four afternoon ball games, there were also four night ball games. The fight for that night, of course, had not begun at the time of the entry to 408 Twenty-first Street. There are only two fight bets included in this.

Q. All right. Now at this time I wish to show you Government Exhibit 5 for Identification, this sheet of white paper containing a list of names and numbers on both sides of it. In your opinion, Inspector Layton, what is that? A. In my opinion the names are names, initials, and something to the numbers, numerical codes representing on this piece of paper people who have placed bets in this particular operation. I will say the names or amounts or figures which in my opinion, represent the amount of

money owed to the operation or owed by them to a player who had won on bets placed previously.

Q. Government Exhibit 3A for Identification—

(Document marked 3A for Identification)

. . . . . .

420 **John Layton**

. . . . . .

By Mr. Flannery:

Q. Now, Inspector Layton, with reference to these fifty-five bet slips which you have testified about, did you
421 make a breakdown as to how much was bet and how much was won and how much was lost and what the profit was for the day as far as those slips are concerned? A. I did, sir.

Q. And what is your answer on that? A. I found that of the wagers indicated on these slips before me, Government's Exhibit No. 2, that the house in this case had a total win of $27,928.

The Court: Over what period?

The Witness: That represents the slips here in this exhibit, your Honor.

The Court: And they represent slips for what period of time? One day?

The Witness: For part of one day.

In other words, the afternoon bets for that particular day.

Against that $27,928 the house had to pay out on bets on which the players won, $14,454 which leaves a profit for the day of $13,474.

By Mr. Flannery:

Q. All right. Now, Inspector Layton, I wish to show you at this time Government's Exhibit 14, which has been introduced in evidence, about which there has been testimony that it was recovered from the left suit coat pocket

of one Julius Silverman, a defendant in this case.

422 In your opinion what is that? A. In my opinion this represents a collection slip on which are various names and other symbols, initials, and figures, to represent people who had played with this operation, and along side of which there are other figures which indicate, to me, the amounts of money to be collected from those individuals.

Q. Now, handing you Government's Exhibit 5, which has been introduced in evidence and about which you have testified, I recall that you testified that this was a record of betters.

Have you had occasion to check the names on the little white slip, No. 14, to see whether any of those names appear on the larger slip, No. 5? A. Quite a number of the names that appear on the small slip, Government's Exhibit 14, do also appear on the large paper, Government's Exhibit No. 5.

Q. All right, sir. Now, handing you Government's Exhibit 3-A for identification,—

Mr. Williams: May I see those last two exhibits you referred to? This one and this one?

The Witness: That is correct.

By Mr. Flannery:

Q. Was 3-A for identification, that photograph,

423 taken under your direction? A. It was, sir.

Q. And is that a photograph of Government's Exhibit 3? A. It is a photograph of Government's Exhibit No. 3.

Q. All right.

Mr. Flannery: Your Honor, at this time I wish to offer into evidence Government's Exhibit 3-A.

The Court: Have you seen it, counsel?

Mr. Williams: No, your Honor.

(Thereupon Mr. Flannery submitted the aforementioned exhibit to defense counsel.)

The Court: It is merely a copy of something that is already in evidence, isn't it?

Mr. Flannery: Yes, your Honor.

Mr. Williams: I was going to suggest, your Honor, if Mr. Flannery says these are copies of things already in evidence we will accept his word for that without going through all of this, if he is just using these—

The Court: Very well.

Mr. Williams: —for the purpose of—

Mr. Flannery: Very well.

The Court: That is what I understood.

Mr. Flannery: All right.

Mr. Williams: —showing pictures.

Mr. Flannery: All right. So it is then stipulated, for the record, that 3-A is a picture of No. 3.

424 The Court: Photographic copy.

Mr. Flannery: Photographic copy.

By Mr. Flannery:

Q. Now, Inspector Layton, if you will, I will ask you to step down from your witness chair and we have here two projectors and two screens.

And I would like you to—I want to ask you some questions about these various exhibits and I understand you can operate these two projectors.

And I would like you to project the exhibits on these two screens.

. . . . . .

The Court: Turn the bright lights out.

. . . . . .

(Thereupon the witness left the witness stand and went to counsel table.)

By Mr. Flannery:

Q. Now, Inspector Layton, I will hand you Government's Exhibit 5, this white sheet of paper containing a list of letters.

Would you insert that into the projector and I am going to ask you some questions about the various notations.

A. (The witness complied.)

425 Q. Very well. Now, calling your attention to that exhibit, particularly to the top name, lefthand side of the exhibit, I see the name Barber, and the number 20 after that.

What does that mean to you? A. The name Barber would indicate to me the name of a player who had made wagers with this operation.

The amount of money there is either owed to the house or owed by the house to the player. It is an accounting of money owed.

Q. Very well. Now, the next name, Bates, and the number 700.

What does that mean? A. That also indicates the name of a player with this operation and an amount of money owed.

Q. Very well. Now, going down a bit, we come to the word, Biloxi.

Do you see that, Inspector? A. I do, sir.

Q. And can you put the arrow on that for the benefit of the jury? A. (The witness complied.)

Q. Very well. Now, next to the word, Biloxi, in red pencil appears the figures, 2450.

In your opinion what does that represent? A. In

426 my opinion, that represents the name of a player with this operation and the amount, 2450, an amount of money, in my opinion, owed by the house to the player.

Q. And why do you say the amount of money is owed by the house to the player? A. Because it is indicated in red.

Q. In red pencil? A. Correct.

Q. All right. Now, then, in your opinion, does that figure, 2450,—what amount does that represent? A. In my opinion, it represents $2,450.

Q. All right. Now, I note by looking at the rest of the exhibit a series of names and figures after most of the names.

Would you say that all those names represent the names of betters with this operation? A. I would say they do, sir.

Q. And wherever the numbers appear in red would you say that that was money owed by the house? A. In my opinion, that would be money owed by the house to the player.

Q. And the other notations in black would be what? A. Notations in black, in my opinion, would be amounts of money owed by the player to the house.

Q. All right. Very well. Now I believe we can pass to another exhibit.

427 At this time I hand you Government's Exhibit 3-A, which is a photographic copy of Government's Exhibit 3, and which you have testified as being what is referred to as a line or odds on games.

Would you put that in the projector, please? A. (The witness complied.)

Q. All right. Now, can all the members of the jury see that?

All right. Now, Inspector Layton, I call your attention to that exhibit and I will ask you, sir, if you will explain what those top words mean, beginning with the word, Cards, and going across to your right?

Please explain that. A. The words on the left, Cards and Cincy represent the names of the two teams playing against each other on April 30th, the St. Louis Cardinals and the Cincinnati Reds.

On the line along—on the same line with the words, Cards, is the name, McDaniel.

Q. Could you put the arrow up there? A. (The witness complied.)

Q. All right. Before we go to McDaniel, I note the letter P.

What is the significance of that? A. The significance of the letter P means that these two teams were even-money bets. In other words, the P stands for a Pick bet.

So that the player would pick either team that he wanted to play on and the odds in that case would be six to five.

Q. Will you explain that? A. The player would have to put up $6 to win $5, no matter which team he picked.

Q. Or $600 to win $500? A. That is correct.

Q. Now, what are those two names mean— A. On the line—on the same line with Cincy is the name Lawrence and out to the right a little farther is the name Nuxhall.

Those were two pitchers for Cincinnati on that day. Lawrence is a possible pitcher and Nuxhall is a possible pitcher.

Nuxhall actually pitched the game.

Q. Now, I note the letter P between those two names. A. That also indicates a pick bet on the pitchers odds.

Q. And the name—the other name? A. Nuxhall—

Q. Is that the name of a pitcher for the Cards—
429 McDaniel? A. McDaniel is the name of the pitcher for the Cards.

Q. Very well. Now, over on the last column to the right, what is the significance of those numbers? A. That figure indicates nine o'clock, which was the scheduled starting time for that game and is what is generallly referred to as post-time.

No bets would be taken after that time except in some cases where there had not been a score on either side. In that case the house might be willing to accept bets.

Generally, no bets were taken beyond that post-time, which in this case was nine o'clock.

Q. Very well. Now, let's go down to the next entry and I see the word, Milw, and under that, Cubs.

What does that mean? A. Those two names again are the names of teams playing against each other on April 30th, Milwaukee and the Cubs, Chicago Cubs.

Q. All right. Now, what is the next notation? A. The next notation is seven to eight and that is on the line with Milwaukee, which indicates that Milwaukee is the favorite to win that game.

The figures, seven to eight, indicate the odds that are quoted on this line sheet for that game. It indicates further that if a player wanted to play on the favorite, Milwaukee, the house would pay him off if he won at the rate
430 of seven to five.

However, if the player—may I correct myself? I am not sure whether I said that right,

If the player wants to bet against Milwaukee and he wins, then the house pays off at the rate of seven to five. If, however, he wants to bet on Milwaukee to win the game he will have to put up $8 to win back $5.

Q. I see. Now, going across I see the name, Buhl, and under that the name, Brosnan.

What do those names mean? A. Those two names are the names of the pitchers for that day; Buhl pitching for Milwaukee and Brosnan pitching for the Cubs.

Buhl again is the favorite, indicated by the odds on the line alongside his name. Those odds on the pitcher are quoted there in figures of forty to fifty.

Actually, that is on a base of $100 and indicates that if the player wants to bet on Buhl as the winning pitcher then he will have to put up $150 to $100, the house putting up $100.

On the other hand, if he bets against the favorite, bets on Brosnan over Buhl, then he will have to put up $100 to win back $140.

The house will pay off at the rate of $140 to $100 while the player must place his bet at $150 to $100.

431 Q. Very well. Now, then over in the righthand side of that particular entry what does 2:30 mean? A. 2:30 again is the starting time for this game, an afternoon game.

Q. Very well. Now, then I see the figures, 2/8.

What does that mean? A. That is the final score for the game on this day. That game had been completed and Milwaukee scored two runs; the Cubs scored eight.

So that Milwaukee in this case lost this game.

Q. I see. Now, the next entry, Pittsburgh, and does L.A. mean Los Angeles? A. L.A. stands for Los Angeles.

Q. And does that represent a game between Pittsburgh and Los Angeles? A. That is correct. It does.

Q. All right. The next exhibit, seven eight, would your explanation be the same as it was to the entry above it? A. The explanation is the same in this case. The team favored to win the game in this case in Los Angeles since the odds appear on the line with Los Angeles.

Again, if you bet on the favorite, bet that the favorite would win, the player has to make his bet at odds eight to five. If he bets against the favorite the house will bet on the favorite at seven to five.

432 Q. All right. Now, then the names, Kline, and Drysdale, are they the names of pitchers? A. Those names represent the names of the two pitchers for that day; Kline pitching for Pittsburgh, and Drysdale pitching for Los Angeles.

Q. All right. And the notations forty fifty, do they mean the same thing as the entries above? A. They do. Again, Drysdale is the favored pitcher with odds—the player having to bet at odds of $150 to $100, and to bet against the favorite he would only win back $140 for $100.

Q. And the notation of eleven o'clock, what does that mean? A. That is the starting time for that game. That was played in Los Angeles and that is the time here that this game would have started.

Q. Very well. Now, going down to the next entry, I see Phils and Frisco.

Are those the names of the two teams? Are they the Phillies and San Francisco? A. That is correct.

Q. All right. Now, without becoming repetitious about this—we won't go into the names of the pitchers—but I see underneath the names of the pitchers 00 and 02.

433 What does that indicate? A. That would indicate the score of the game by innings to that point;

a zero-zero tie in the first inning and Philadelphia did not score in the second inning.

Frisco scored two runs.

Q. Very well. Very well. Now, let's pass to some of these other exhibits.

Now, Inspector Layton, I will hand you what has been marked Government's Exhibit 2, which is one of the fifty-five slips which you have characterized as being bet slips.

I will ask you, sir, if you will, to insert that into the other projector. A. (The witness complied.)

Q. Now, sir, I call your attention to that exhibit, No. 2, and I will ask you, if you will, to explain the significance of the various notations on that exhibit. A. First, in the upper lefthand corner of the exhibit are the initials CC. That is a symbol indicating to the house who the player was on this particular bet.

Down about midway of the exhibit are the letters, Milw, indicating the team, Milwaukee. Then the figures 375 with a diagonal line and the numbers 250.

That indicates that a bet had been placed by the player, CC, on Milwaukee, and he bet $375 to $250. The 375 has been marked around with blue pencil lines on three
454 sides of it which indicates that that was a losing bet for the player and a win for the house.

And the figures at the bottom of the exhibit, plus 375, in blue pencil, indicates again that that was a win for the house of $375.

Q. Very well. Now, I will hand you Government's Exhibit 2-A, another one of the bet slips, and ask you to explain the significance of the notations on that exhibit? A. On this exhibit, again, in the upper lefthand corner are the letters, ETH, which indicate the identity of the player.

This bet is on—you have two bets indicated on this exhibit. One is on Detroit. The player bet on Detroit at $100 to $150 put up by the house.

A bet also was made on Roberts as the bet is recorded in the name of the pitcher, Roberts. And the bet again by the player, $100 to $120. The Detroit game had been completed and the 150 has a red line above and below it, which indicates a loss by the house.

Q. All right. And had the other game been completed yet? A. The other game had not yet been completed.

Q. I see. Very well. Now I will hand you 2-B for identification.

Would you explain the entries on that, please?

435 A. On this slip, again, the identity of the player is indicated in the upper lefthand corner by the name, Hook. This indicates a bet on Detroit at $100 bet by the player to $155 by the house.

The second bet is on the Cubs. $100 was bet by the player against $140 for the house.

In this case also the house lost, which is indicated by the red line above and below 155 as well as the red line above and below 140. It is also indicated by the notation at the bottom of the exhibit, which is minus 295 in red figures, indicating that the house lost on these two bets a total of $155 plus $140, totaling $295.

Q. I note what appears to be the letter A above the Detroit and Cubs.

Does that mean anything? A. That is a notation used by the house in this case and indicates the pitcher, pitching odds.

Q. I hand you 2-C.

Will you explain that, please? A. On this exhibit the player's identity is indicated in the upper lefthand corner by Joe A. This bet is on the pitchers, Buhl over Brosnan, $600 being bet by the player against $400 by the house.

Again the lines around the 600 are in blue crayon and indicate that this was a winning bet for the

436 house, losing for the player.

The notation at the bottom of the exhibit, plus 600, in blue pencil again indicates a win of $600 by the house.

Q. I will hand you 2-E for identification. Will you explain that please? A. On this exhibit the player's identity is indicated by the word, LaMont. This has three bets on the exhibit; a bet on Brosnan to win over Buhl, the player betting $1,000, the house putting up $1,400.

The red lines above and below the 1400 indicate that this was a losing bet for the house.

The second bet is Ford over Lary, the player betting $1,650 and the house putting up $1,000. The blue pencil marks around 1650 indicate a win for the house.

The third bet is Garver over Brewer, the player putting up $500 against the house's $700. The red lines above and below 700 indicate that the house lost on this bet and the minus 450 at the bottom of the exhibit indicates the total loss on this slip for the house.

In other words, a win of $1,650 against losses of $1,400 and $700 leaves a balance of $450.

Q. Which the house lost on these bets? A. The house lost on this bet.

Q. All right. I will hand you 2-F. Will you
437 please explain that? A. In this exhibit the player's identity is indicated by the name, Howard in the upper lefthand corner. The bets here, one is on the Yankees to win, the player putting up $1,650 to the house's $1,000.

The second bet is on Milwaukee to win, the player putting up $750 against the house's $500.

Both of these bets were wins for the house and lost for the player and the total of $1,650 plus $750—I beg pardon—$750, would be $2,400. So that an error had been made in adding those up.

It is indicated as plus 2300.

Q. I see. Now, the notation P under Yanks and Milwaukee means what? A. The P indicates the odds are on the pitcher, quoted odds.

Q. All right. I will hand you 2-G.
Will you explain that?

. . . . . .

438 A. In this exhibit the player's identity is indicated by the figure 14 in the upper lefthand corner. The bet here is on the pitcher, Brosnan, to win.

The player put up $1,000 to the house's $1,350. This was a loss by the house and indicated both by the red lines and the minus 1350 at the bottom of the exhibit.

Q. Now, I will show you 2-K for identification.

Will you explain that, Inspector? A. This exhibit also indicates the player's identity by the word, Callahan, at the upper lefthand corner. It is a fight bet, a bet on the fight that was on that night rather than a baseball game.

The indication of the bet there is by the letters, GOES, which indicates that the player is betting that the fight goes the limit.

He is betting $1,000 to the house's $1,600 and, of course, this fight had not been completed up to the time that that was seized.

Q. All right. Now, with respect to the line, do the fighters' names appear on the bottom of that? A.
439 They do appear at the bottom. I don't believe you can see it too well in this exhibit.

Q. I see. They appear on the original exhibit 3, do they not? A. They do.

Q. And what are those names and what do they mean? A. The names on the paper are Hinnant and Bowdry. Alongside the name Bowdry are the figures 8 and 2. That indicates the odds—indicates, first of all, that Bowdry is the favorite.

It indicates the odds on that particular event. The house in that case, if they were betting on Bowdry—if the player wanted to bet against him on Hinnant, the house would put up odds at eight to five.

On the other hand, if the player wanted to bet on the favorite, Bowdry, he would have to put up two to one odds.

The last notation on the paper is DONT for "don't", and the figures 9 and 11.

That indicates the odds that the fight will not go the limit or don't go, in the parlance of the gamblers. The odds there are noted at nine to eleven, again indicating that if the player bets that the fight will not go the limit he must put up odds of eleven—must bet at eleven to five; put up $11 to win back $5.

If the house—if he bets that it goes the limit then the house is quoting odds at nine to five. The player
440 puts up $5 to win back $9.

Q. Thank you, Inspector.

I have these other exhibits but I don't believe I will ask you about them in the interest of saving time.

* * * * * * * * * *

Cross-Examination

By Mr. Williams:

* * * * * * * * * *

441 Q. Now, when was it that you assigned Detective Stone to this case? A. During March. My best recollection is about the middle of the month of March.

Q. Did you discuss with him the use of the spike microphone in this case? A. I did, sir.

* * * * * * * * * *

Q. How long had you had this device prior to
442 March of 1958? A. I was reassigned to the gambling squad in November, 1957, and the device was there at that time, and had been for some months prior to that.

Q. Did you have more than one of those instruments? A. No, sir.

* * * * * * * * * *

Q. When was it that you secured the blueprints of the premises at 408, 410 21st Street? A. They were secured

sometime subsequent to the arrests in this case. I don't recall the date.

. . . . . .

443 Q. Did you have any familiarity as a result of investigation or otherwise with the physical layout of the premises at 410 and 408 21st Street? A. I did not.

Q. Did you suggest to Detective Stone that an effort should be made to ascertain where the heating ducts were in these premises? A. I did not.

Q. Did there come a time when you had a conversation concerning the heating ducts of these premises with Detective Stone or Agent Bedingfield or Agent Jewell? A. There came a time when there was some discussion about the heating duct.

Q. Were you not advised, Inspector, that contact had been made by the officers assigned to this case with the heating duct at 408 21st Street? A. No, sir. That was not stated as a positive thing.

Q. How was it stated, Inspector? A. It was stated that contact may—the contact may have been made with the heating duct at the time of the raid, and we,

444 we determined at that time that the heating duct was at a particular location within the premises that were raided, 408 21st Street.

Q. Now, let's see if I understand what you are saying. You mean, the first conversation that you had regarding the heating duct was on April 30th, 1958? A. That is correct.

Q. On April 30th, 1958, you saw, did you not, Inspector, that the heating register for 408 21st Street was about two feet back from the front wall?

Isn't that so? A. That is approximately correct, yes, sir.

Q. And you knew, as the head of the gambling division and the head of the investigation being conducted in this case, that the spike microphone, which has been identified as Defense Exhibit 2, had been inserted in the baseboard

of 410 21st Street on the second floor bedroom, approximately two feet back from the front wall, did you not? A. No, sir. I did not know the exact location.

Q. Well, were you not told that on April 30th?

Mr. Flannery: That calls for hearsay, your Honor.

The Court: Sustained. That calls for hearsay.

By Mr. Williams:

Q. Well, did you not know that as of April 30th? A. I did not, sir.

445 Q. Now, did you make some measurements of that heating duct? A. I did not.

Q. Either the heating duct at 410 or 408 21st Street? A. The question is what, sir?

Q. Did you, yourself, make or did you suggest or direct that measurements be made of the ducts at 410 and or 408 21st Street? A. I neither made any measurements nor did I direct measurements to be taken in either premises.

. . . . . .

460 Mr. Flannery: The Government rests.

. . . . . .

461 Mr. Williams: Your Honor, at this time I respectfully move Your Honor to enter a judgment of acquittal specifically on the second count of the indictment. Mr. Wadden will join me in that motion so it is made on behalf of all defendants. He will probably have something to say on it.

. . . . . .

468 For these reasons, Your Honor, we feel there has been no showing of any violation under the second count of the indictment and I respectfully urge that Your Honor, on this particular count, enter a judgment of acquittal.

. . . . . .

Mr. Wadden: No, Your Honor, all I was going to say on behalf of my defendants, I would like to adopt Mr. Williams argument. I do not think I could add anything to it.

The Court: No, it was pretty complete.

Mr. Flannery: This second count was the most important count in the indictment and I don't think the Plummer case applies here.

. . . . . .

476 I, therefore, respectfully suggest that counsel's motion to count two be denied.

. . . . . .

478 The Court: I am going to take this under advisement until Monday morning anyway.

. . . . . .

479 Mr. Williams: With respect to the first count on Defendant Silverman, I submit, Your Honor, there is no evidence to support the fact he was in possession of certificates, documents, or records used in violation of the gambling laws in the District of Columbia at the time he was arrested.

The indictment charges him with being in possession on April 30 at the time he was arrested. The evidence shows he was arrested at a place remote by a number of yards from the physical premises.

The Court: Across the street from the parking lot. He had something that was taken from him, as I understood, to have relationship to gambling.

Mr. Williams: He had a ticket and I do not think Inspector Layton said it of necessity related to gambling; that he found some names on the tickets and numbers, and said some of those names were on exhibits but the paper doesn't show any real connection.

The Court: Is that the sum and substance of this motion?

Mr. Wadden: I am going to address myself, Your Honor, to Title 22, Section 1508, which is the statute I think Your Honor said bothered him. It is the baseball and

. . . . . .

480 The Court: Are you going to say anything further?

Mr. Wadden: Only to stand, Your Honor, on the objection we made to the admissibility on count one.

The Court: I will deny your motion to count one. We have passed count two, haven't we?

Mr. Williams: Yes, sir.

Mr. Wadden: I am going to stand on Mr. Williams argument on count two. But I do want to address myself to 15, 22, 1508 as concerns Defendant Meyer Schwartz.

As Your Honor may remember, I asked each of the witnesses that listened over the listening device if they could tell that Meyer Schwartz made or accepted a bet. I had them examine their notes and they testified before Your Honor, that they were unable to testify from their notes that Meyer Schwartz accepted a bet or anything. Therefore, Your Honor, as concerns Meyer Schwartz, I move that count be dismissed as to him.

The Court: Denied. Anything further on motions now gentlemen?

. . . . . .

481 The Court: If you find anything in addition to what you have said, and frankly I am bothered about it and I don't mind telling you, that will reinforce what you said, I will be glad to see it. But, I will promise you, whether you give it to me or not, I will move at 10:00 o'clock on the motion to acquit as to count two.

485 Monday, March 23, 1959.

. . . . . .

486 The Court: The Court is ready to rule on the motion that was presented or orally for the acquittal of the defendants on Count 2 of the indictment.

During the week end the Court has seriously considered the motion and the arguments and the Court has also considered the very thoughtful memoranda that has been cited by counsel. And the Court is of the opinion that it had on

last Friday, that the motion should be denied, and it is herewith denied.

* * * * * * * * * * * * *

489 Mr. Williams: * * * I would like, if the Court please, at this time to ask Your Honor to exercise his discretion and hear the defense in a renewal of the
490 motion to suppress all the evidence in this case, and I ask this for the consideration of Your Honor for these reasons:

I believe that we are going to be able to show Your Honor that the witnesses in this case who have testified concerning the use of the electronic device, both here in this courtroom and in the courtroom of Judge Holtzoff back on October 28th, have been somewhat less than candid, and I use those words very carefully and advisedly, in disclosing to Your Honor and to Judge Holtzoff fully and completely and openly and ingenuously, as I would expect an officer of the law to testify with respect to the manner in which the device was used.

I believe that we are going to be able to show, Your Honor, if permitted, precisely how this device was used so that a clear ruling can be made on facts that, I believe, will not be disputed.

The Court: Well, that can't be done until the Court is apprised what is done by reason of your witnesses.

That is a matter for the defense, isn't it?

Why are you arguing it now? Why not present it at the right time?

Mr. Williams: Well, I feel that Your Honor, if you heard this evidence—

The Court: But I can't hear it until you put your witnesses on the stand.

491 Mr. Williams: I would like the opportunity to call them out of the presence of the jury at this time, so that Your Honor may rule on the motion to suppress.

The Court: Have you any objection to that?

Mr. Flannery: I see no good reason for it, Your Honor.

The Court: The Court can't see any good reason for it either.

I think we ought to proceed in the regular, ordinary fashion.

Mr. Williams: May I say this to Your Honor—

The Court: If the Court is convinced on the entire record, he certainly will suppress the evidence and order the jury to pay no attention to it.

On the other hand, if the Court is not convinced, I think it is clearly a matter for the jury.

Mr. Williams: I simply want to say this, Your Honor, and I will be through.

. . . . . .

492 The Court: Well, I tell you, Mr. Williams, under the circumstances of this case, why it is just a little bit different than the broad assertion that you have made.

Now, I have already ruled on that at the beginning of this case, and I am still of the opinion that I was right, and if I am not, why, there are two Courts above me who can correct the error.

So that is the answer.

. . . . . .

493 Mr. Williams: And I understand that Your Honor feels that you should not hear this evidence.

The Court: In the absence of the jury?

Mr. Williams: In the absence of the jury?

The Court: That is right.

. . . . . .

498 **Thomas W. LaVenia**

. . . . . .

Direct Examination

By Mr. Williams:

. . . . . .

Q. What is your occupation, Mr. LaVenia? A. I am a private investigator.

. . . . . .

Q. Now, directing your attention to Saturday, March 21, were you at the premises of 408 and or 410 21st Street, Northwest, in Washington, D. C.? A. Yes, sir, I was in both premises.

Q. Will you tell the Court and jury what type of houses they are, sir? A. These are row houses, rather narrow front, with party walls connecting them.

Q. How many row houses are there which are annexed one to the other along that street to your best recollection? A. I did not make a count of them. I go by them quite often.

I believe there are six. I could be wrong.

Q. Can you tell the Court and the jury approximately what time you entered the premises at 410 21st
500 Street? A. About—we entered 408 first and then 410.

I would say we went into 410 somewhere around 10:20 a.m.

Q. And approximately what time was it when you entered 408? A. Pretty close to 10:00 a.m.

Q. Now, bearing in mind, Mr. LaVenia, please, that this is 410—I have numbered it at the back—and this is 408, is it the fact, sir, that 410 is north of 408? A. Yes, it is.

Q. And there is a party wall that separates them? A. Yes, sir.

Q. Now, when you went into 410 where did you go in that house? A. We entered on the first floor and we went up to the second floor to the front bedroom.

Q. When you went to the front bedroom, Mr. LaVenia, did you observe where the heating register was in that house? A. In 410 it is on the north wall.

Q. Approximately how far from the front wall, and by that I mean this wall which faces the east? A. That wall has a curve in it and it is my guess it was about 18 inches.

. . . . . .

501 Q. Now where—you said the heating register begins approximately 18 inches from the front wall? A. Yes, sir.

Q. And it extended how far west?

The Court: What is the width of it?

The Witness: The open area of the register is
502 about 15 inches. The face plate is about 12.

By Mr. Williams:

Q. Now, did you inspect, Mr. LaVenia, the baseboard of the south wall of 410 21st Street on the second floor? A. Yes, sir.

Q. What did you find, if anything, unusual with respect to the baseboard? A. When you get down on your knees and you look, you will see that the saddle strip and the floor are approximately 18 inches in from that front wall, has an oval indentation. This is a wooden saddle strip and a wooden floor.

The Court: When you say "saddle strip," you mean the molding?

The Witness: Yes, sir, the shoe molding.

The Court: Yes.

By Mr. Williams:

Q. You say it has an oval indentation? A. Yes, sir.

Q. Approximately how big would that be? A. I had that spike with me and it was about the size of the spike.

Q. I am going to hand to you, Mr. LaVenia, what has been marked Defendant's 2-A for identification, and ask you how the oval that you observed compares in
503 diameter with that spike. A. Well, about the best way I can say that is it would be almost about the size of a glove made to fit this spike.

Q. Now, did you make an observation with respect to the condition of the party wall at the place where you observed this oval in the shoe molding? A. Well, I probed with a coat hanger from the front wall back to where that indentation was.

I had an open coat hanger.

And a few inches before the indentation you don't feel brick or what feels like brick, and then you suddenly come

to a scratch on metal and you have about a 9-inch scratch on metal.

In other words, there was no brick for about 9 inches on that wall, which is common with 408 and 410.

* * * * * * * * * * *

504 Q. Now, so that the jury will understand exactly what you mean, do I understand that you probed from this room here with a coat hanger and struck metal? A. Yes, sir, we probed between an opening under the shoe molding and the baseboard.

Q. And how long—or how wide was the opening through which you struck metal? A. About 15 inches, sir.

Q. And how far in was the metal from the wall? A. I would like to refer to my notes, but if you want my best—

Q. Yes, sir.

The Court: You may.

The Witness: Now, if I can have the question again, please, sir.

How far in before we first struck metal going into the wall?

About 15 inches, sir. That was with the coat hanger before we measured it.

By Mr. Williams:

Q. Now, when you struck—before you made this test on 410—and I understand you went into 410 at approximately 10:20, is that right? A. That is correct.

505 Q. You went into 408? A. Yes, sir.

Q. What time was it when you went into 408? A. Approximately at 10:00 a.m.

I believe—there was an appointment made with the people in 408 for 10:00 a.m.

Q. Now, when you went to 410, did you go to the second floor front room? A. Yes, sir.

Q. Did you observe where the heating register was in that front room? A. In 408 the heating register is on the north wall, which is common with 410.

Q. Now, how far back from the front wall? A. Again, there was a curve, but it was approximately the same distance back as it was in 410, which is about a foot and a half, was a guess.

Q. Where it begins? A. Where it began.

Q. In other words, it was in the same position for 408 as it was for 410? A. Yes, sir.

Q. What, if anything, did you do with respect to that heating register, Mr. LaVenia? A. Well the front
506 of the register or the duct, the register itself, was removed from the front of the duct.

Then we proceeded to take measurements after looking in there.

The measurements were taken by myself and two gentlemen from the American Amplifier Company—I have had trouble remembering their names.

Their names are Wetzel and, I believe, Wenzinger.

Q. Wenzinger? A. Wenzinger, that is correct.

We had rulers. We had a flashlight, and we proceeded to take measurements.

* * * * * * * * * * *

507 Q. Bearing in mind that this is the heating register for 408— A. Yes, sir.

Q. —did you measure how far back the duct went? A. Yes, sir, we did.

Q. How far did it go, sir? A. The duct from the—the duct width, itself, the clearance of it?

Q. The depth. Let's talk about depth. A. Just about the duct now, is 4¾ inches, that is the duct itself.

There is additional, of course, the baseboard and the shoe molding and the plaster, furring.

508 The Court: You mean that is the depth from the wall?

The Witness: Sir, that is the inside measurements of the metal of the duct.

The Court: What is the outside edge that you measured from?

The Witness: We measured—we measured the duct opening as 4¾ inches, and the back of the duct to the front of the molding is 5 9/16 inches, and there is an additional 9/16 inch of shoe molding.

By Mr. Williams:

Q. There was baseboard along here, wasn't there, at the time? A. Yes, sir.

Q. The baseboard is about so high, 6 inches? A. The baseboard, if I recall, is about 3 inches high.

Q. Then there is shoe molding in front of the baseboard, is that correct? A. Yes, sir.

The Court: It is quarter round molding, isn't it?

The Witness: Yes, sir, That is 9/16.

By Mr. Williams:

Q. But the actual duct itself has a depth exclusive of the molding, of the baseboard, of 4¾ inches. A. Yes, sir, but there is one other measurement in there.

509

The duct, when it comes up, does not come up with its face flush with that baseboard. There is furring and plaster.

There is a lip that comes over which sets it back of the duct, back 5 9/16 inches.

Q. So the back of the duct is back how far, sir? A. 5 9/16 inches from the baseboard lip inside of 408.

Q. So that the measurement of 4¾ inches only went to the lip of the duct, is that right? A. That is right, the opening of the duct, yes, sir.

Q. Now, did you remove the register from the wall of 408? A. The—I was there when the register was removed, yes, sir.

Q. Did you look into the duct? A. Yes, sir.

With the aid of a flashlight I looked into the duct.

So did Mr. Wenzinger, and I believe you did, and Mr. Wadden.

Q. And what did you observe there? A. Now, this is a curved cap of a duct. It fits onto the other portion of the duct.

510 At the baseboard level, at the back end of the duct, the end toward 410—

Q. So—well, no, what you are talking about, you are referring to this line here? A. Yes, sir.

Q. Which is tin, is it not? A. That is right, sir.

Approximately at the center of it is a nail with a head that was loosened.

To the right, toward the front of the building, approximately 2 inches from the front end of that duct, between the nail and the front end of the building, we found an indentation, a protrusion, a projection coming into the duct.

This would be approximately a half-inch below the baseboard level, the floor level.

Q. Would you tell the Court and jury the size of the protrusion or the indentation, as you described it or called it?

The Court: Well, is it a protrusion or is in an indentation or what is it? Is it a mark on the side of the duct?

The Witness: Sir, from the 408 side looking in at that duct, the building that the duct services, there is a protrusion or a projection.

511 The Court: How far?

The Witness: A projection towards you of metal.

The Court: Far in the duct?

The Witness: Yes, sir, where the metal has been pushed towards you.

The Court: I see.

The Witness: The size of it, I would say, would be about the size of the tip of a lead pencil, just a—it is a small pimple.

The Court: That is on the side wall of the duct, is it?

The Witness: No.

The Court: The back.

The Witness: Oh, it's the back of the duct, sir.

The Court: In other words, something has been pushed into it, you say, or it looks that way.

The Witness: It looks that way, yes, sir.

The Court: All right. That is better than a protrusion.

By Mr. Williams:

Q. Now, after you observed that, Mr. LaVenia, did you undertake to insert a spike from 410 through the oval of the shoe mold? A. Yes, sir, we did.

Q. Would you tell the Court and jury exactly how
512 you did it, what you did, and what you observed when you did that? A. All right.

Mr. Wetzel, myself, and Mr. Wenzinger, I believe, came over with us.

I think the whole group went over to 410.

I am pretty sure at least Mr. Wenzinger, yourself and Mr. Wadden.

We used the flashlight and the shoe molding is—is not snug with the floor, nor is the molding along the edge of the wall.

And you put a flashlight, you can practically see right in there and with a screw driver toward the front end of the duct, we put a little pressure on the wood only, and we put the light in and we saw a mark, where there is a bright, shiny mark on the back end of that duct where something had been stuck in, and right next to it there was a scratch or a—

The Court: That is in the tin?

The Witness: Yes, sir.

The Court: At the back of the duct?

The Witness: Yes, sir.

Then we took the spike with the light and ran the spike up to that from where we were to the indentation, and we took measurements of how far in you had to
513 go to get into the indentation.

By Mr. Williams:

Q. When you ran the spike on a straight line through the oval in the shoe mold, what did the tip of the spike hit? A. It hit the thing that I have been describing as a protrusion, into 408, and an indentation from 410 in that duct.

Q. Now, Mr. LaVenia, did you measure the distance from the wall of 410 to the back of the duct belonging to 408? A. Yes, sir, we did.

Q. Will you tell His Honor and the jurors the measurements that you found when you measured that distance, including the shoe molding, the baseboard and then the plain air space? A. We found that we had to go in 7⅛ inches to touch that duct, back of the duct.

Q. 7⅛ inches, counting what, sir? Counting the shoe mold and the baseboard? A. Yes, sir.

Q. How wide did you compute the shoe molding and the baseboard to be? A. We know that the shoe molding was $\frac{2}{16}$ of an inch. We know it is a 1-inch trimmed down baseboard which would bring it to about $\frac{7}{16}$ inches trimmed out.

Q. Wait a minute. A. Your baseboard—

514 Q. What did you say? A. Your baseboard will be 14/16.

Q. In other words, it is almost an inch and a half? A. Yes, sir.

Q. It is an inch and $\frac{7}{16}$ to be exact. And by that I mean both the width of the shoe molding and the baseboard are $1\frac{7}{8}$ inches. Correct? A. That is correct, sir.

Q. Did you then compute how far it is from the wall itself exclusive of the shoe mold and the baseboard to the back of the duct? A. No, sir, we did not. As a matter of fact, what we really computed was from the outer edge of the shoe mold to the back of the duct at 7⅛ inches and by subtracting that you can come to the answer.

Q. Now, did you ascertain, Mr. LaVenia, the nature of the party wall on either side of the duct? A. Yes, sir.

Now, what we did was, we took this coat hanger that we had opened and we slid it along and we found brick.

* * * * * * * * * * *

515 Q. This is brick? A. Yes, sir.

A. All right.

Now, did you find out what is beyond the duct? A. Brick also.

We used—

Q. Is that solid brick? A. Well, as far as we could ascertain it was.

We used a flat metal ruler that is about 2 inches wide, lying flat, and 12 inches long, and we could slide it in between that 9-inch area along the back of the duct but you couldn't get beyond the other side.

Q. What is in this space to which I am pointing immediately beside the duct? A. Nothing.

Q. Nothing? A. Nothing.

516 Q. Is that right? A. No, sir, there is nothing.

Q. No brick in there? A. Nothing.

Q. The wall has been channeled out completely there, is that correct? A. Yes, sir, it would appear that it was. But there is nothing there.

Q. Now, did you make an attempt, sir, to insert your spike 2 or 3 feet beyond the duct? A. When we made an attempt with the coat hanger and with the spike—

Q. Were you able to do it? A. No, sir.

Q. Did you make an attempt, sir, to insert the spike or the coat hanger to the left of the duct? A. Oh, yes. Oh, yes.

Q. Were you able to do it? A. No, sir.

Q. Did you measure, Mr. LaVenia, the length of this wall, by any chance? A. I did not measure it, no, sir.

Q. Now, did you determine that to be the duct which conveys hot air for heating the premises? A. Yes, sir.

517 Q. Now, had you been to those premises, sir, on a previous occasion? A. Yes, sir.

Q. At that time did you make an attempt to hear sounds through the wall with a spike microphone? A. Yes, sir.

Q. Did you make it at any area where the duct is located? A. No, sir.

Q. Or any area before it? A. No, sir.

Q. Did you use a spike microphone such as is in evidence here as Defendant's 2 for identification? A. Yes, sir, that is a Schmidt. Yes, sir, that is what we used. I used the same type, yes, sir.

Q. When you ran this test, were you able to hear through the brick wall? A. No, sir.

Q. Were you able to hear sounds—did you run a test on voices? A. This is the first time.

Q. Yes, sir. A. I went—

Q. With the naked ear? A. With the naked ear, yes, sir.

518 Q. Were you able to hear? A. Only when they were shouting, loud shouting.

Q. Now, on the occasion when you went to these premises on Saturday, was a decibel count made? A. Yes, sir, it was. We had—

Q. Who made that decibel count? A. Mr. Wenzinger of American Amplifier.

. . . . . .

Cross-Examination

By Mr. Flannery:

Q. Now, Mr. Witness, when was the first time you went to these premises? A. March 17, St. Patrick's Day.

Q. March the 17th? A. Yes, sir.

Q. And then you made your second trip Saturday, March the 21st? A. Yes, sir.

. . . . . .

519 Q. Do you understand anything about sound waves or the principle of sound? A. I believe so, yes, sir.

Q. Basically, I believe it is true, isn't it, that sound waves, if one takes sound waves, radiate from the sound of one's

voice, for instance, in all directions, isn't that right? A. Yes, sir.

Q. Now, and then they create vibrations which are picked up by the human ear, is that correct? A. That is correct.

Q. Now, you know, don't you, that sound waves can be transmitted through a brick wall? A. I would like to tell you, sir, that I know that sound waves can be heard through a brick wall if they are very loud.

The continuation of a brick wall vibration—the possibilities of a brick wall are very, very low.

As a matter of fact, a brick wall or a plaster wall are included more in the soundproofing area rather than in the sound transmission area.

520 Q. Yes. But in answer to my question, sound waves can be transmitted through a brick wall and you can hear voices through a brick wall under certain conditions, isn't that right? A. Under certain conditions, that is correct, yes sir.

Q. That is right.

Now then, you admit also, do you not, that on one of these trips which you made to these premises you did hear voices through the brick wall with your naked ear? A. Yes, sir, I did.

Q. Now, Mr. Witness, of course you had no idea in what condition these premises or this party wall was as of April of 1958, do you? A. No, sir I do not.

Q. And you don't know of your own personal knowledge whether the heating register or the wall was tampered with or changed in some way since April of 1958? A. No, sir, I have no knowledge.

Q. And in addition to that, Mr. Witness, you did not use Defendant's Exhibit 2 for identification, that spike mike which Mr. Williams held up a few minutes ago, to conduct your test, did you?

Mr. Williams: I want the record to show that we asked for it, if the Court please, and couldn't get it.

The Court: That may be, but the fact is that he
521 didn't use the exhibit.

Mr. Flannery: That is the point.

The Witness: I did not use the exhibit.

By Mr. Flannery:

Q. Did you, Mr. Witness? A. No sir, I did not.

Q. Now, as I understand your testimony, you first went to premises 410 Saturday? A. No. First place we went on Saturday was to 408.

Q. 408? A. Yes, sir.

Q. And at 408 did you measure the depth of the heat duct on that trip? A. Yes, sir.

Q. And what did you observe on that first trip to 408 with respect to the heat register? A. We observed that the heat register was in depth 4¾ inches, at the back of the heat register to the face of the shoe—of the floor molding—baseboard, was $5\frac{9}{16}$ inches, that the shoe molding was $\frac{9}{16}$ inches.

We also observed—you asked me about measurements or what we observed—I am sorry.

Q. What you observed. A. We also observed that on the back of the heating register from 408, as you look
522 into it, at approximately the center, about a half-inch below the floor board, a nail was loosened.

To the east of that, toward the front wall, approximately 2 inches from the front side of that duct, along the back, there was a protrusion into the duct.

Q. Yes.

Now, on your previous trip on March the 17th, had you gone to both 408 and 410? A. I was—on March the 17th I was only in 410.

Q. 410? A. Yes, sir.

Q. Now, on March the 17th, did you do anything else other than try to hear through the walls? A. On March the 17th we tried to get a spike into the wall of the back bedroom and then Mr. Williams says, "This is the wrong room. It is the front room."

And then we went into the front room and I tried to get a spike into the wall at the nearest part of it, which would be the back end of that wall, approximately, maybe 8 feet from where that duct is now, and I tried several places and I couldn't get the spike to go into that brick at all.

Q. Did you try at the place some 2 feet from the wall where— A. No, that is why we went back. Mr.
523 Williams told me it was developed during the trial it was at the front that we should have made the test.

Q. I see.

Now, with respect to this protrusion which you say you saw on the back of the heat register in 408, you don't know in what manner that protrusion was put there, do you? A. No, sir, I don't know.

Q. You don't know how long it has been there? A. No, sir, I do not.

Q. Now, I believe you testified there came a time when you went to 410 21st Street and you inserted a coat hanger or a spike and that you had to put this object 7½ inches in from the lip of the toe molding to touch what you referred to as the back of the duct, is that correct? A. I believe that I said 7⅛ inches, sir.

Q. 7⅛? A. Yes, sir.

If the record or your notes shows 7½, then I was in error.

Q. Oh, no, I probably was in error. 7⅛ inches. Is that correct, sir? A. Yes, sir.

. . . . . .

525 **Carl Joseph Wenzinger**, Sworn.

Direct Examination by Mr. Williams:

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Q. What is your occupation? A. Electronics engineer, specializing in sound acoustics.

. . . . . .

526 Q. (By Mr. Williams) Directing your attention, Mr. Wenzinger, to Saturday, March 21st, two days ago, were you on the premises at 408 or 410 Twenty-first Street, Northwest? A. Yes, I was; both.

Q. Did you observe the front room of the second floor of 408 Twenty-first Street? A. Yes, I did.

Q. Did you observe, Mr. Wenzinger, where the heat register is? A. Yes.

Q. For that room? A. Yes.

Q. Where is that, sir? A. It is approximately eighteen inches back from the front wall, which faces onto Twenty-first Street.

Q. How wide is that register? A. About nine inches.

Q. It begins at a point eighteen inches back from the wall, is that right? A. No, it begins a little less—I believe the center is approximately eighteen inches.

Q. Now, did you look inside the register at 408 Twenty-first Street? A. Yes, I did.

Q. Mr. Wenzinger, we have a very crude diagram
527 here. This represents the second floor, front room of 408; this represents the register of 408, and this is the party wall, as a whole.

(Indicating on the blackbroad.)

Now, Mr. Wenzinger, did you take note of what that party wall is constructed? A. Yes, it is brick and plaster.

Q. And of what thickness brick, sir? A. Approximately two bricks thick.

Q. Now, did you measure, Mr. Wenzinger, the depth of the duct leading into the register in the front room on the second floor of 408 Twenty-first Street? A. Yes, I did.

Q. And how deep is that duct, sir? A. I have some notes here—is it okay to refer to them?

The Court: Yes, go ahead.

A. (continued) It was—now, the depth of the duct itself was four and three-quarters inches, that is from the rear of the duct to the front of the surface of the wall there.

Q. Now, did you observe, Mr. Wenzinger, whether or not there is baseboard and shoemoulding at the bottom of the wall at 408 Twenty-first Street, Northwest? A. Yes, there is.

Q. The wall with which we are concerned. Now,
528 is your measurement of four and three-quarters inches exclusive of the shoemoulding and the baseboard? A. Yes, it is.

Q. Did you look into that duct, sir? A. Yes.

Q. Did you observe anything unusual in that duct? A. Two things, one was a nail which apparently was holding part of the duct in place—the nail was somewhat loose—and also a small indentation in the 408 side of the duct.

Q. Now, was the indentation protruding out or was it inwards from 408? A. It was pointing toward 408.

Q. It was pointing toward 408? A. That's right.

Q. Did you feel that with your hand? A. Yes.

Q. Would you tell his Honor and the jury approximately the size of that identation with relationship to the end of this spike, which has been marked as Defense Exhibit 2-a for identification?

(Handing the witness the exhibit.)

A. Well, the size of the indentation was, roughly, well, less than a sixteenth of an inch, quite sharp; it is a little hard to describe it relative to this, but about the same size, maybe a sixteenth of an inch, the point.

529 Q. Well, was it perforated? A. I didn't look at it that close. You mean, was there a hole in it?

Q. Yes? A. I don't know.

Q. Now, did you go, Mr. Wenzinger, onto the premises of 410? A. Yes, I did.

Q. And when you went onto the premises of 410, did you go to the second floor front room? A. Yes.

Q. This was after you had gone onto 408? A. Right.

Q. Did you observe where the heating register was in 410? A. No, I did not.

Q. Did you examine the shoemoulding along the party wall of 410? A. Yes.

Q. What, if anything, did you notice on that shoemoulding? A. At a point about eighteen inches in from that front wall of 410, there was a small, oh, round-shaped groove, I guess you'd call it, in the bottom side of the shoemoulding, which was about an eighth of an inch in
530 diameter, maybe a little larger.

Q. And how did that — was the groove shaped from the bottom of the shoemoulding or from the top? Was it from the bottom— A. It was at the bottom of the shoemoulding between the shoemoulding and the floor.

Q. Did you look under the baseboard, Mr. Wenzinger? A. Yes, I did.

Q. And what did you see when you looked under the baseboard? A. Well, I had a flashlight, and in peering under the baseboard, well, laying on the floor there, I saw the rear side of the heating duct which enters, or rather, which feeds into 408.

Q. You saw the back tin wall of this heating duct? A. That's correct.

Q. Was there anything that obstructed your view, from 410, looking onto the baseboard at the point of the oval? A. Nothing at the point of the oval, no. In fact, the only obstruction was one nail which was also loose and holds the shoemould down, but that entire area was open.

Q. Did you make any test, Mr. Wenzinger, to determine where insertion under the baseboard could be made along, say, the first five feet of this wall? A. Yes, I did.
531 Q. And what did you find, sir? A. The only area was in a, roughly, nine-inch width of the duct itself, behind the duct itself.

Q. The nine-inch width behind the duct? A. Right.

Q. What did you find with respect to either side of the duct? A. It appeared to be solid masonry or brick.

Q. Were you able to get a coat-hanger in under the shoemoulding there? A. Under the shoemould, yes.

Q. How far? A. Oh, I didn't measure it—not more than, I'd say, an inch or inch and a half.

Q. Did you try it, Mr. Wenzinger, with a spike of the same type as Defense Exhibit 2-A? A. Yes, I did.

Q. What was your experience with it? A. The same; it was only, only possible to insert it in that one area behind the duct.

Q. Now, when you inserted it behind the duct, what did you find? A. It was possible to insert—to probe, pardon me, oh, in the order of about six and a half or seven inches.

532 Q. And that includes the— A. Includes the shoe-mould.

Q. And the baseboard? A. Right.

Q. Now, when you inserted it at that point, Mr. Wenzinger, was there any sound made when you came into contact with the duct? A. Definitely.

Q. What was that sound? A. Well—

Q. If you can describe it? A. If you slid the probe back and forth, left and right, laterally, that is, it was a scratching sound, like metal on metal; and if you pushed on it, you got the typical—"boop," I guess you'd call it—as when you push on a piece of tin that gives just a little bit tight, popping sound.

Q. Were you able to tell readily what you were striking? A. Yes.

Q. And was that true, Mr. Wenzinger, for the whole nine inches of the register? A. Yes.

Q. Now, on the occasion of your visit, did you bring a decibel counter? A. A sound pressure meter, yes.

Q. Would you tell his Honor and the jury what the
533 function of a sound pressure meter is? A. Yes. A sound pressure meter is a calibrated device which will measure the actual amount of sound in a given location or room.

Q. And that is measured in decibels, is it? A. That is correct.

Q. Would you explain to the Court and jury and for the record what a decibel is? A. A decibel is a unit of measurement of, well, in this case, sound; or sound pressure level.

Q. It's the way a ruler measures distance— A. In inches.

Q. In inches—you measure sound noises in decibels? A. That's correct.

Q. What is the average decibel count of a conversation, Mr. Wenzinger? A. Oh, the average conversation is somewhere in the order of about sixty-five decibels?

Q. Now, did you make a test to determine whether or not you could hear with the naked ear through this party wall? A. Yes, we did.

Q. Were you able to hear conversational tones through that wall? A. No.

Q. What was the lowest decibel count which you heard voices through that wall when you made this test
534 Saturday? A. Eighty-seven D.B.—that's abbreviation for decibel—in the second floor room there at 408.

Q. Now, would you show to the Court and jury what an eighty-seven decibel noise sounds like? A. Yes, I can do it two ways, one with a single frequency, and also with a spoken voice.

Q. Would you do it this way, sir.

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535 (Accordingly, the witness demonstrated the sound, as requested.)

* * * * * * * * * *

536 Cross-Examination by Mr. Flannery:

Q. Now, Mr. Witness, of course, the size of this room and the acoustics in this room are entirely different from the size and the acoustics of the premises at 408 and 410, is that not correct, sir? A. That's correct.

Q. And your decibel recorder would record differently

under those circumstances, for instance, if the tests were run in those smaller premises? A. No, the meter actually measures sound pressure, and it would not make any difference what the size of the room—if you had a given sound source and a given—

Q. Yes. Now, let's just assume—oh, let me ask you this: Did you use your decibel pressure machine on the premises 410 to hear conversations in 408? A. No, the level was too low.

Q. You mean you didn't conduct a demonstration trying to measure sound from 410? A. Let me get it straight. You mean did we use the meter in 410?

Q. Yes. A. We attempted to, but the attenuation through the wall was sufficiently great that it was not possible to get it through.

Q. Yes, but let me ask you this: When you are
537 in a small room and talking, the sound waves come from your mouth and bounce or echo off walls, don't they? A. That's correct.

Q. Now, suppose there was a large rug, on the opposite wall, in 408, the wall opposite from the party wall—do you understand my question? A. You mean to the left of this diagram here?

Q. Yes? A. Right.

Q. Now, what effect would that rug have on sounds? A. That would tend to attenuate the sound even more.

Q. What do you mean "atte ate?" A. It means that you would have less transmission of sound, less bounce off the wall.

Q. You would have less bounce off that opposite wall, and, therefore, less distortion, wouldn't you? A. No, not—

Q. Listening from 410? A. No, that has nothing to do with distortion.

Q. Doesn't the fact that the sound waves go out and bounce off walls, somewhat like radar, tend to distort the sound, to one listening from another room? A. Only in a large room, a very large room.

Q. Well, to a less degree, it would occur in a
538 small room, wouldn't it, then? A. Well, in theory it does occur, but in actual practice the human ear cannot determine any distortion which would occur in such a small room as that because of the small dimensions of the room.

Q. Now, did I understand you to say that you tried to hear conversations from 410 occurring in 408 with the naked ear? A. That is right.

Q. Now, did there come a time when you heard something emanating from 408 with your naked ear at 410? A. I never did myself, no.

Q. You didn't? A. No.

Q. You didn't conduct such a test? A. I did not conduct the listening part of the test.

Q. Oh, well, who conducted that? A. I believe it was Mr. Wetzel, and Mr.—I believe it was Mr. Wadden. No, wait a minute, Mr. Wadden was actually doing the talking; I was taking the measurement.

Q. Mr. Wadden was doing the talking where—in 408? A. In 408, that's correct.

Q. And you were doing what in 410? A. I was taking the measurements of the originating sound.

539 Q. In 408—where he was? A. That's correct.

Q. And you didn't go to the other side of the wall to try to pick up his voice? A. Not at that time, no.

Q. Well, at any time, did you? At any time, did you go to 410 and try to hear with your naked ear people conversing in 408? A. Yes.

Q. Well, could you hear? A. Not normal conversation tones, no.

Q. Well, how do you know how loudly they were talking if you were in the room next door? How do you know whether they were talking normally or not if you were in the room next door with a wall between you? A. I would have to take the word of the person who was carrying on the conversation.

Q. You would take the word of the person carrying on the conversation?

Mr. Williams: Your Honor, we have to put witnesses on one at a time. We can't put them both on together.

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540 The Court: That is so obvious, it requires no answer.

Mr. Williams: Yes, sir.

Q. (By Mr. Flannery) Now, Mr. Witness, you, of course, don't know, what the condition of that party wall was on April 1958, do you? A. No, I don't.

Q. And you, of course, don't know when the tuberance or the lock on the register was caused? A. No, I don't.

Q. Or how it was caused or who caused it? A. No.

Q. And you don't know whether or not between April of 1958 and today, anyone has removed the register from 408 or tampered with it in any way, do you? A. That's right.

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541 Redirect Examination by Mr. Williams:

Q. Do I understand, Mr. Wenzinger, that when you put carpeting on a wall, and talk in the direction of the carpeting, that would even lessen the chances to be heard in the next building? A. To some extent, yes, that is correct.

Q. At the time that you conducted your test there was no carpeting there, was there? A. No, sir.

Q. Now, what is the normal decibel reading, Mr. Wenzinger, of a telephone conversation? A. It would be approximately the same as an average conversation, something in the order of sixty-five decibels.

Q. Let me ask you this question: If this exhibit, known as 2-A, Defendant's 2-A, were placed up against the heating duct, what effect would that have, sir, in picking up voices at other places, on the premises of 408, where there were heat registers? A. Well, the nature of a heating duct is that it passes air, of course, for heating, and sound

waves are, of course, in turn, transmitted through the air, so, consequently, a heating duct is, in a sense, a conductor of sound, which means that it should be possible, under the proper conditions, to pick up noises at that point which originate in other parts of the house.

Q. The contact of the microphone with the duct makes the whole heating system a conductor of sound from that building, is that right? A. That's correct.

. . . . . .

Redirect Examination by Mr. Wadden:

. . . . . .

Q. (By Mr. Wadden) Mr. Wenzinger, when you got down on your hands and knees, I believe, almost laid down on the floor of 408, and inspected the back end of 410, inspected the back end of the vent which belongs to 408, what, if anything, unusual did you see on the back of the vent? A. Just the indentation which I noted on the other side, which was just about, oh, maybe a half inch below the floor level, and in direct line with the oval shaped—

Q. It was directly in line with the oval in the floor board to which you have testified to, is that correct? A. That's correct.

. . . . . .

Examination by Mr. Williams:

Q. Since this point was raised, Mr. Wenzinger, by Mr. Flannery, may I ask you if you ever conducted the test for decibel computation using this sound?

(Indicating the machine.)

A. Yes.

Q. And did you set this sound so that it would be at a given decibel point? A. Yes.

Q. And with this sound emanating from 408, did you attempt to hear the recorded sound in 408,—410, I'm sorry? A. Yes, I did.

Q. Were you able to hear this when it was pitched at the decibel point of ordinary conversation through that wall? A. No.

Q. When did you run that test, sir? A. I believe it was in October of 1958.

Q. And with this sound, coming from this machine, what was your decibel computation penetrating the wall? A. I don't recall the exact figures at the moment. Do you have a copy of the report?

Q. Does it refresh your recollection that this test was run on October 4th? A. Yes.

Q. 1958? A. Yes. That's correct.

550 In fact, I believe I have a copy of the figures with me, if you want the exact figures.

Q. Would you, sir?

(The witness left the witness stand and secured certain data, and returned to the witness stand.)

A. At that time, it was October 4th, we ran the test with fixed frequencies and also with a prerecorded tape on which was recorded the numbers, one, two, three and four. This tape was formed in a continuous loop, played back on the tape recorder, feeding through the equipment you see right here, and set at a predetermined level as measured with the sound pressure meter in the second floor bedroom of 408.

We then went over to the second floor front bedroom of 410 to determine the feasibility of hearing and distinguishing the spoken word in 408.

Q. At the time you went to 410, you knew what was on the tape? A. That's correct; In fact, I had made the tape myself, and there were three of us. Each one of us had heard the tape. We knew the contents of the tape, and with the—even knowing the contents of the tape, and with the sound pressure of seventy-five decibels in 408, it was possible in 410 to hear a noise, but not to distinguish the spoken word.

In other words, you could not—you could not know, in other words, that the words were one, two, three and four.

551 Q. In other words, in 410, having prerecorded that, at seventy-five decibels, you couldn't even distinguish one, two, three, four of your own voice? A. That is correct.

. . . . . .

Vincent J. Fuller. Sworn

Direct Examination

By Mr. Williams:

. . . . . .

Q. You are a member of the bar of the District of Columbia, are you, sir? A. Yes, sir; I am.

Q. Directing your attention, Mr. Fuller, to October 4th, 1958, were you at the premises of 410 or 408 Twenty-first Street? A. Yes, sir; I was.

552 Q. And were you accompanied by Mr. Wenzinger, who just left the courtroom? A. By Mr. Carl Wenzinger, yes, sir.

Q. Now, on that occasion, did you assist Mr. Wenzinger, in running any tests to measure conversation which could be heard from 408 to 410 Twenty-first Street? A. Yes, I did.

Q. From which of the houses did you listen on this test? A. Well, we produced the noise in 408, and we were in 410 to see if we could listen.

Q. Now, how many voice levels by decibels were run in 408 to 410? A. There were three different levels set.

Q. What were the three levels, sir? A. The first one we used was one hundred and ten decibel, and then we dropped the level down to ninety, and the last one was eighty.

Q. Do you have normal hearing? A. I would say I had normal hearing, yes, sir.

Q. Were you able to hear the hundred and ten sound? A. Yes, I could hear the hundred and ten noise.

Q. Were you able to hear the ninety? A. I could not hear the ninety level, no.

Q. Did you experience differently from Mr. Wenzinger?

553 A. My recollection is that Mr. Wenzinger thought he could hear some noise or distinguish what was being said in 408—I do believe he thought he could hear some noise being reproduced.

Q. Was there a carpeting on the wall of 408 at that time? A. My recollection is that there was none—yes, sir—no carpeting.

Q. Do you know whether the sound speaker was directed toward the south wall or the north wall of 408 Twenty-first Street? A. Well, the speaker was directed toward 410—I guess that would be the north wall.

Q. In other words, the sound was being sent directly at this wall? A. Yes; that's correct.

Q. Now, Mr. Fuller, directing your attention now to March 21, 1959, Saturday last, were you at the premises of 408 or 410 Twenty-first Street? A. Last Saturday I was there, yes, sir, again.

Q. Did you go to the second floor of 408 Twenty-first Street? A. Yes, sir; I did.

Q. Did you observe where the heat register is? A. Yes, sir; I did.

554 Q. Where is it, sir. A. It is located—again, that would be the north wall. That is the wall between 408 and 410; it's on the forward part of the front bedroom, toward Twenty-first Street, that would be.

Q. How far back from the front wall is the register located? A. Well, actually I made some sort of rough measurement. I think it will come out to be approximately twenty-six inches—was the further edge of the register from the forward wall.

Q. Was the register itself removed from the wall? A. Well, the face of the register was removed, yes.

Q. Was the depth of the duct measured? A. Yes, it was.

Q. Do you recall the measurements? A. My recollection is that the inside of the duct was four and three-quarters; four and three-quarters inches, I think it was.

Q. Did you make any observations with respect to the interior of the duct at 408 Twenty-first Street? A. Well, the duct went straight down, it appeared, and I put my hand in there, and rubbed it along the tin lighting of this duct, and there were two places where some instrument had put a dent—in other words, protrusions on the side I was at, into the tin.

555 Q. Now, that was at 408? A. That's at 408, yes, sir.

Q. How deep would you say those protrusions were? If they were different, how deep was each? A. One was larger than the other. I am not sure I can say in terms of inches. It was impossible to measure; I couldn't measure—I'd say maybe a sixteenth of an inch.

Q. What was it in relationship to the diameter of that spike which is Defendants' Exhibit 2-A for identification? A. Well, the larger of the two, I'd say, was something less than that diameter—not very much less—and the smaller one was maybe half again that.

Q. I have in mind the tip? A. Oh, the tip of that—well, that size, yes, certainly.

Q. Now, did you go onto the premises at 410 Twenty-first Street? A. Yes, sir; I did.

Q. What, if anything, did you observe with respect to the shoemoulding along the baseboard at the party wall? A. Well, the wall shoemoulding came down to the floor, only a certain area there, didn't quite reach the floor, wasn't tight to the floor. There were air spaces.

Q. Were there any marks on the shoemoulding? A. I don't think I can say.

556 Q. At 410? A. I am not at all sure I can tell.

Q. Did you look under the shoemoulding? A. Yes, I got down on the floor and had a flashlight and put it along the floor and looked under there, yes.

Q. And what did you see when you looked through at that point two feet from the— A. Well, it was the other side of this air duct, the tin air duct, could see the tin lighting. The tin lighting in the air duct.

Q. Was there anything that separated you from the tin when you got down below the baseboard? A. No, it was just air; that's all.

Q. Did you attempt to insert either a spike or a coat hanger at points up to five or six feet behind this front wall? A. I can't say whether I did this myself or whether someone else did it while I was there—I can't recall whether I did it or someone else—it was done.

Q. Did you watch it? A. Yes, sir; I did.

Q. Was it possible to insert anything below the shoe-moulding into the wall at a point other than the width of the duct? A. No, it was not.

Q. Do you know of what construction the wall was made, other than at the place where the duct is? A.
557 I believe it to be brick, the wall to be made of brick.

Q. Is the wall of double brick construction? A. I would say it was a two-brick wall, yes.

Q. Is there any brick or cinderblock or mortar or anything else, other than tin, the tin that comprises the duct, at this point which you described as being, I believe, eighteen to twenty-six inches back from the front wall? A. No, there is nothing there, except the tin.

Q. And when you said it was twenty-six inches back, you meant the farthest end, is that correct? A. That's correct; that end away from the wall.

Q. Did you measure that space, Mr. Fuller, did you measure the space, the empty space, from four hundred and ten— A. Well,—

Q. Where you could see this duct— A. We inserted a rod, somewhat like this one here—this is twelve inches long. (Indicating)

And it extended—it went into this space, with the exception, I think, of four and seven-eighths of it, was left

outside, that is, did not go into the wall; so it was seven and one-eighth of an inch did go into the wall and hit the tin duct.

558 Q. When you say that seven and one-eighth went into the wall, are you including the shoemoulding and baseboard as part of the wall? A. That is correct; yes, sir.

Q. Did you compute the width of the shoemoulding and the baseboard? A. Well, I made an estimate—it was difficult, because it was not one flat surface to measure—I made what I considered to be the best estimate I could.

Q. Did you use a ruler? A. Yes, sir.

Q. What did you compute it to be? A. You are speaking of the total now, or for each?

Q. For each? A. For each. I think the shoemoulding at the very lowest would be nine-sixteenths of an inch, and the baseboard itself, I believe, was fourteen-sixteenths.

Q. So that almost an inch and a half of the seven and an eighth inches that you just testified to was comprised of shoemoulding and baseboard? A. That's correct; yes, sir.

Q. Now, when you inserted a coat hanger or a spike at that place, that empty spot in the wall, were you able to hear any sound when the coat hanger or the spike contacted the tin? A. Well, I could hear metal striking metal, yes, a scraping.

559 Q. Were you able to tell what you were hitting? A. Well, I—no, there was no trouble—I knew what I was hitting before I even saw what it was, actually.

Q. Was there any resiliency or give to the tin? A. Yes; if you used a stiff instrument, as the rod I mentioned, the tin would bend.

Q. Could you hear it bend? A. Yes, sir; you could. A buckling noise of metal on metal, buckling.

. . . . . .

Cross-Examination

By Mr. Flannery:

• • • • • • • • • • • •

560 Q. • • • Now, of course, Mr. Fuller, you don't know what the condition of that wall was in April of 1958, do you? A. No, I do not.

Q. You don't know what the condition of this heating vent in 408 was in April of 1958, do you? A. No, I do not.

Q. You have no idea how the two indentations in the vent at 408 were put there—you don't know how they were put there, do you? A. No, I don't.

561 Q. Now, finally, as I understand it, you said that from the premises 410 Twenty-first Street, your device which you used to measure to the rear of the vent at 408, recorded seven and an eighth inches, is that correct? A. That is including the baseboard and the shoemoulding, yes.

• • • • • • • • • • • •

562 **John R. Lynch**

was called as a witness by the Defendants, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

Direct Examination

By Mr. Williams:

• • • • • • • • • • • •

Q. Where are you employed, Mr. Lynch? A. Woodward and Norris Realtors.

563 Q. How long have you been so employed? A. About 9 or 10 years.

Q. What is your occupation with Woodward and Norris? A. Property manager.

Q. Are you familiar with the premises at 408-410 21st Street? A. Yes, sir.

Q. Is it your business, Mr. Lynch, to know of alterations

and remodeling done in the properties managed by Woodward and Norris? A. Yes, sir.

Q. Would you tell His Honor and the jury whether any changes have been made in the property at 408 or 410 21st Street during 1958 and 1959? A. No changes, no, sir.

Q. Directing your attention specifically to the wall between the two houses, have there been any changes in this wall between 408 and 410? A. No, sir.

Q. Has there been any change to your knowledge in the duct leading to the register which warms the room in the front of the second floor of 408 21st Street? A. No, sir.

Q. Do you have any records showing the last changes on either of these premises? A. I have an estimate
564 for decorating that was done in December.

Q. Of which year? A. '58.

Q. And what decorating was done, if you know? A. Painting of the walls and ceiling of the front bedroom, second floor, painting side walls of the rear bedroom.

The Court: Is that on 408?

The Witness: That is 408, yes, sir.

The Court: All right.

The Witness: Painting the side walls of the top hall and one wall of the lower hall.

Mr. Williams: That is all I have, Your Honor.

Cross-Examination

By Mr. Flannery:

Q. Have you ever been in 408 21st Street? A. Yes, sir.

Q. When was the last time you were in there? A. The early part of December of '58.

Q. '5. A. Yes, sir.

Q. And prior to December of 1958, what is the last time you have been in there? A. Sometime before the last tenant had moved out.

It seems to me that was about two years ago.

565 Q. What was the purpose of the redecorating in December of '58, because the prior tenant had moved and you were redecorating? A. Yes, sir.

Q. And that prior tenant was Robert Martin, wasn't it? A. Yes, sir.

Q. So he had control of those premises until December of 1958? A. I believe his rent was paid until November 18.

Q. Now, of course, Mr. Lynch, you don't know of your own personal knowledge whether anyone ever removed the heat register at 408 for any purpose, do you? A. No, sir.

. . . . . .

566 [Defendant's Exhibits 2-A, B, C and D, being the various parts of the microphone, were received in evidence.]

Mr. Williams: I would like to offer, if the Court please, Defendant's Exhibit for identification, 1, 3, and 4, which constitute the notes of Officers Bedingfield, Stone and Jewell, which were identified by them.

Mr. Flannery: I am at a loss to see the relevancy of those.

The best evidence was the testimony of the witnesses.

The Court: Well, I thought their testimony corresponded with the exhibits, but it doesn't make any difference.

They may be received.

Mr. Flannery: All right.

The Deputy Clerk: Defendant's Exhibits 1, 3-A through 3-G, and 4.

[Defendant's Exhibits Nos. 1, 3-A through 3-G, and 4, being notes of witnesses, were received in evidence.]

Mr. Williams: Your Honor, the blue prints for the premises at 408 and [illegible] were marked by counsel as Government's No. 1, but I don't believe they have ever
567 been offered.

. . . . . .

568 [Blue prints heretofore marked Government's Exhibits 1-A, 1-B, 1-D, 1-E, 1-F, 1-G, 1-H, were remarked Defendant's Exhibits 5-A, 5-B, 5-D, 5-E, 5-F, 5-G, and 5-H, for identification and received in evidence.]

. . . . . .

570 [At the bench:]

Mr. Williams: I would like to offer this affidavit, Your Honor, since the question has been raised again and since Your Honor takes the position that this is a legal matter, this motion to suppress, for Your Honor's consideration. I would like to offer this as part of the record of the whole case, where these men have stated positively that they did not touch these premises.

The Court: I don't see what this affidavit is worth. It is really self-serving, no opportunity for cross-
571 examination.

I will deny your offer.

Mr. Williams: Well, I am going to have it marked so—

The Court: Oh, yes, have it identified.

. . . . . .

Mr. Williams: With that, Your Honor, we rest.

I think that is the whole thing we want to offer and we can submit such instructions as we have prepared for Your Honor's consideration.

The Court: Hand them to my law clerk.

Mr. Williams: All right.

The Court: Have you any rebuttal.

Mr. Flannery: No, I have no rebuttal, Your Honor.

The Court: Well, I congratulate you gentlemen on coming to such a quick conclusion of this case.

. . . . . .

Tuesday, March 24, 1959.

. . . . . .

579 The Court: Is there anything before you start your argument, gentlemen?

Mr. Flannery: I would like to approach the bench.

[At the bench:]

Mr. Williams: I don't know that Your Honor was going to instruct the jury on.

Which instructions were granted and which were denied?

The Court: Well, I have denied all yours, naturally.

. . . . . .

581 **Summation on Behalf of the United States**

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589a **Summation on Behalf of the Defendant Silverman**

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615 **Summation on Behalf of Defendants Martin and Schwartz**

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616 **Reply on Behalf of the United States**

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625 **The Court's Charge to the Jury**

The Court: The Court will now read for you its instructions which constitute the law of the case as far as you are concerned.

You have heard the evidence and the statements and arguments of counsel for the prosecution and the defendants. It now becomes your duty to determine whether or not the defendants are guilty of the offenses with which they are charged.

Before discussing the charges against the defendants in detail I shall first summarize for you the general principles of law that must govern you and guide you in determining the issues in this case.

It is the function and the duty of the jury to determine issues of fact. It is the duty of the Court to instruct you as to the principles and rules of law governing the case. You are bound and obligated to follow the Court's instructions as to the law and to take the law from the Court.

On the other hand, you are the sole judges of the facts and you must determine the facts for yourselves solely upon the evidence presented at this trial.

The fact that the defendants are charged with certain crimes and have been indicted is not to be taken as an

indication of guilt. The sole purpose of an indict-
626 ment is to bring the defendants before the Court.
An indictment is merely the machinery and the procedure provided by law for placing defendants on trial.

Every defendant in a criminal case is presumed to be innocent and that presumption attaches to the defendant throughout the trial. The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains that burden and proves beyond a reasonable doubt that the defendants have committed every element of the offenses with which they are charged the jury must find them not guilty.

As I said a moment ago, the burden is on the Government to prove the defendants guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond any doubt whatsoever. It means proof to a moral certainty and not necessarily proof to an absolute or a mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourself and not just any whimsical speculation or capricious conjecture.

Proof beyond a reasonable doubt simply means this. If, after an impartial comparison and consideration of all the evidence, you can say to yourself that you are not satisfied of the defendants' guilt then you have a
627 reasonable doubt.

On the other hand, if, after such impartial comparison and consideration of all the evidence, you can truthfully and candidly say to yourself that you have an abiding conviction of the defendants' guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is proof that will result in an abiding conviction of the defendants' guilt on your part, such a conviction that you would be

willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charges against the defendants beyond a reasonable doubt you will consider and weigh the testimony of all witnesses who have testified before you, all the circumstances concerning which testimony has been introduced, and the exhibits which have been received in evidence.

You are the sole judges of the credibility of witnesses. In other words, you and you alone are to determine whether to believe any witness and the extent to which a witness should be credited. And in reaching your conclusion as to the credibility of any witness and in weighing the testimony of any witness on the witness stand, the
628 witness' manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, and whether the witness has any interest in the outcome of the case, all of those matters, as well as any other factors that appear to you as having a bearing on the matter, you may consider and weigh in determining what witnesses to believe and the extent to which you credit them.

If you find that any witness willfully testified falsely as to any material fact, concerning which the witness could not possibly have been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness or any part of such testimony.

The arguments of the lawyers in this case are entitled to your careful consideration so far as you find them logical and reasonable. You are to remember, however, that the lawyers are advocates of their respective sides and what they say does not constitute evidence.

In criminal cases there are two kinds of evidence. One is known as direct evidence and the other, circumstantial evidence. By direct evidence is meant proof which tends to show the existence of a fact in question without the intervention of the proof of any other fact.

It is that evidence which, if believed, establishes
629 the truth of a fact in issue and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses.

Circumstantial evidence consists of circumstances from which the defendants' guilt may be inferred by the jury. One cannot say that either of the two types is more reliable or stronger than the other.

If the circumstantial evidence is sufficiently strong it may be as convincing as direct evidence, because circumstances speak for themselves and, if they are strong enough, they may lead to a definite conclusion.

The law permits conviction of a criminal offense on circumstantial evidence alone. In order to justify a verdict of guilty on that basis the circumstantial evidence must be of such degree and character as to point to the defendants' guilt and also must be inconsistent with the defendants' innocence.

In order to justify a verdict of guilty on the basis of circumstantial evidence alone such circumstantial evidence must be inconsistent with any other theory except that of the defendants' guilt.

Both kinds of evidence, direct and circumstantial, have been introduced here. Both kinds of evidence are equally entitled to the consideration of the jury. Sometimes
630 the jury may consider that circumstantial evidence is stronger than direct evidence, but the rule of law is, whether the evidence be direct or circumstantial or a combination of both, before you may find the defendants guilty you must find that the evidence proves beyond a reasonable doubt the essential elements of the crimes with which they are charged.

Among the witnesses who have appeared in this case, both for the Government and the defendants, are witnesses referred to as experts. A person who, by education, study, and experience, has become an expert in any art, science,

or profession, and who was called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not, however, bound by any such opinion. You may give it such weight as you deem it is entitled to receive whether that be great or slight, and you may reject it if, in your judgment, the reasons given for it are unsound.

In weighing the testimony of an expert it is proper for you to consider all the surrounding circumstances, his opportunity of knowing about the matters concerning which he testifies as an expert, and his willingness to expound fairly in reference to his expert knowledge.

While you should consider the opinion of the
631 experts you are not bound to follow their conclusions.

It is your duty to take the law from the Court. You should not let sympathy or prejudice enter into your deliberations or enter into your verdict. Bear in mind you are a fact-finding body. You are the judges of the facts. Impartiality is expected of you just as it is of me.

Every defendant is entitled to a fair and impartial trial, uninfluenced by passion, prejudice or any other emotion.

The defendants here have been charged by the Grand Jury as follows:

In Count 1 the Grand Jury charges that on or about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz knowingly had in their possession and under their control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in violation of Title 22, District of Columbia Code, Sections 1504 and 1508.

Second Count: Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin, and Meyer Schwartz, set up and kept a gambling table

at premises located at 408 21st Street, Northwest, for the purpose of betting on the results of baseball games,
632 prize fights, and boxing matches.

Third Count: Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin, and Meyer Schwartz, did knowingly as lessees, agents, operators, and occupants, maintain, aid and permit the maintaining of a gambling premises located at 408 21st Street, Northwest.

Fourth Count: Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin, and Meyer Schwartz, did accept bets and wagers, gamble and make book on the results of athletic contests, that is to say, baseball games, prize fights, and boxing matches.

Fifth Count: Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin, and Meyer Schwartz, were engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

Signed by the Attorney of the United States in and for the District of Columbia, and the foreman of the Grand Jury.

When you do a thing on purpose you do that which you intend to do. Now, the intention that a person has in doing a certain act is to be gathered by his actions
633 and by his words at that time and preceding that time. No man can read the secrets of the human mind and in the administration of justice men must seek the intention and gather it from the words and actions of the person involved from the testimony in the case.

Intent need not be proved directly. The jury may infer intent from the circumstances of the case as disclosed by the evidence.

You are instructed that a person who advises, incites, or connives at the commission of a criminal offense or who is present at the scene thereof, aiding or abetting another in its commission, is jointly guilty of the offense. The words "aid" and "abet" comprehend all assistance rendered by acts, words, encouragement, support, or presence, actual or constructive, to render assistance should it become necessary.

In order to aid and abet another to commit a crime it is necessary that a defendant, in some sort, associate himself with the venture; that he participate in it as in something that he wishes to bring about; that he seek by his actions to make it successful.

The defendants are charged in the second count of the indictment with the offense of setting up a gambling table at 408 21st Street, Northwest, for the purpose of betting on the results of baseball games, prize fights, and boxing
634 matches.

The statute, Section 1504, Title 22, of the District of Columbia Code, upon which that charge is based, reads as follows:

Whoever shall set up or keep any gambling table or any house or place for the purpose of gaming or any kind of a gambling table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property or shall induce, entice, or permit, any person to bet or play at or upon such gambling table or gambling device or on the side of or against the keeper thereof, shall be punished as the law requires.

Another provision of the law is that all games, devices, or contrivances, at which money or any other thing shall be bet or wagered, shall be deemed a gambling table within the meaning of Sections 22-1504 to 22-1506, and the courts shall construe such sections liberally so as to prevent the mischief intended to be guarded against.

In order for you to find the defendants guilty under the second count of the indictment the Government must prove beyond a reasonable doubt, one, that the defendants

unlawfully set up a gaming table adapted, devised, or designed, for the purpose of playing any game of chance for money or property, or designed to induce, entice, and permit any person to bet or play at or upon any such
635 gaming table; two, that the gaming table was set up in the District of Columbia.

The term "unlawfully" means contrary to the law, illegally or wrongfully. The essence of this offense is the furnishing of facilities for gaming activity.

Gaming, gambling, or wagering is the risking of one's money or other property on an event, chance, or contingency, in the hope of the realization of gain.

You are instructed that if you find beyond a reasonable doubt that the defendants set up and kept a gambling table, as that term has been described, during a period from April 21, 1958, to and including April 30, 1958, at 408 21st Street, Northwest, in the District of Columbia, for the purpose then and there of receiving bets and wagers on baseball games, prize fights and boxing matches, you may find the defendants guilty of the charge contained in the second count of this indictment, provided you find beyond a reasonable doubt that the gambling table was set up and kept at 408 21st Street, Northwest, for the purpose of receiving bets and wagers on baseball games, prize fights, and boxing matches in violation of law.

You are further instructed that a gaming table need not require the physical presence of the person or persons making the bet or bets. A gaming table may be carried on contrary to law by the establishment of facilities where bets and wagers on contests, such as baseball games,
636 prize fights and boxing matches, may be received by the use of telephones.

In other words, a gaming table may be carried on even though the person or persons making the bets or wagers are not physically present at the time the bets and wagers are made and there is no passage or transfer of money at that time.

Accordingly, you are instructed that if you find beyond a reasonable doubt that the defendants unlawfully set up and established facilities for the purpose of receiving via telephone bets and wagers on the results of baseball games, prize fights, and boxing matches, and that the gaming table so set up was designed for that purpose, you may find the defendants guilty on Count 2 of the indictment.

In the first count of the indictment the defendants are charged with having in their possession, knowingly, and under their control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used in violation of Title 22, District of Columbia Code, Sections 1504 and 1508.

The Court has already instructed you that Section 1504, Title 22, District of Columbia Code, forbids the setting up of a gaming table. The Court will instruct you later regarding the context and meaning of Section 1508 of the same Title.

The first count concerns Section 1502 of Title 22,
637 District of Columbia Code, the pertinent part of which reads as follows:

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, or paper, or writing, current or not current, used or to be used in violation of the provisions of Sections 22-1504 or 22-1508, shall be punished as the law provides.

That Section also says for the purpose of this section possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper or writing, shall be presumed to be knowing possession thereof.

The jury is instructed that the essential elements of the offense charged in the first count are possession or control of the things forbidden with knowledge of such possession or control, and such possession or control must have occurred in the District of Columbia.

You will observe that the statute, as I have read it to you, provides that possession of any of the things forbidden shall be presumed to be knowing possession. That presumption will prevail unless and until evidence in refutation satisfies you that the presumption should no longer have force.

The word "knowing" or "knowingly", as used here, means simply consciously or on purpose.

638 If you find from the evidence beyond a reasonable doubt that the defendants in this case possessed the things forbidden by the statute or controlled them, and that the things so possessed and so controlled are things forbidden by the statute and that such possession of such things was with the knowledge of the defendants, and it occurred in the District of Columbia, you may find the defendants guilty of the offense charged in the first count.

The third count of the indictment charges that continuously from about April 21, 1958, to about April 30, 1958, within the District of Columbia, the three defendants knowingly as lessees, agents, operators, and occupants, maintained and aided and permitted the maintenance of a gambling premises at 408 21st Street, Northwest.

The statute, 22-1505, provides in pertinent part as follows:

It shall be unlawful for any person in the District of Columbia, knowingly as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

The essential elements of that offense consist of the following: One, the maintaining of a gambling premises; or, two, aiding and permitting the maintaining of gambling premises; three, knowingly; and, four, in the District of Columbia.

639 The word "knowingly" has already been defined to mean simply consciousness or on purpose.

You are instructed that where the defendants are charged, as here, with being lessees, agents, operators, and occupants, in the conjunctive, the Government need only

prove one of those things charged. Likewise, as here, where it is a charge that the defendants maintained, aided and permitted the maintaining, the Government is required to prove only one of those things as charged.

For example, the Government may show either that the defendants were lessees, agents, operators, or occupants, or the Government need only show beyond a reasonable doubt that the defendants maintained, aided or permitted the maintaining of a gambling premises. The Government has no obligation to prove all of those things.

If you find from the evidence beyond a reasonable doubt that the defendants knowingly acted as lessees, agents, operators, or occupants of the premises charged, and that they maintained, aided or permitted the maintaining of gambling on those premises you may find the defendants guilty as charged.

Count 4 of the indictment charges that during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, the defendants did accept bets and wagers, gamble and make book on the results of
640 athletic contests, that is to say, baseball games, prize fights, and boxing matches.

The statute, 22-1508, provides in pertinent part as follows:

It shall be unlawful for any person or association of persons to purchase, possess, own, or acquire, any chance, right, or interest, in any policy lottery or any lottery, or to make or place a bet or wager, accept a bet or wager, gamble, or make books or pools on the result of any athletic contest.

For the purpose of this section the term "athletic contest" means any of the following wherever held or to be held: A football, basketball, softball, basketball— I don't know but I think I said "basketball" twice. I should have said "baseball". I will say it over again. A football, baseball, softball, basketball, hockey, or polo game, or a tennis, golf, or wrestling match, or a tennis or golf tournament, or a prize fight or boxing match, or a trotting or

running race of horses, or a running race of dogs, or any other athletic or sporting event or contest.

The essential elements of that offense are as follows: Acceptance of bets on athletic contests, including baseball games, prize fights, or boxing matches, in the District of Columbia. The essence of the offense is the accepting of bets or wagers.

641 You are instructed that when one wagers or bets he risks his money or property on an event, chance, or contingency, in the hope of the realization of gain.

If you find from the evidence, beyond a reasonable doubt, that the defendants here accepted bets or wagers or received bets or wagers, either in person or by telephone, and that such bets or wagers were accepted by the defendants or received by them, and that such bets or wagers concerned a chance or a contingency based on the outcome of athletic contests, you may find the defendants guilty as charged in the fourth count of this indictment.

The defendants are charged in the fifth count of this indictment with failure to pay the special occupational tax. The statute, 26 United States Code 4411, upon which that charge is based reads as follows:

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax on all wagers placed in such pool or lottery.

In order for you to find the defendants guilty under the fifth count of this indictment the Government must prove beyond a reasonable doubt, one, that the defendants were engaged in the business of accepting wagers from about April 21, 1958, to April 30, 1958; two, that the de-

642 fendants did not pay the special occupational tax required by law.

If you find that the Government has failed to prove both of these requirements beyond a reasonable doubt you must find these defendants not guilty on that count of the indictment.

In this case the three defendants are charged with five separate crimes. Those offenses charged in the indictment, and the evidence applicable thereto, should be considered separately as to each count of the indictment and as to each defendant.

The fact that you may find one defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other count of the indictment or as to the other defendants.

It is your duty, ladies and gentlemen of the jury, to consider all the evidence as to each defendant and as to each count of the indictment and then return your verdict as to each defendant on each count of the indictment. Upon your return to the courtroom your foreman will state your verdict but each of you individually may be asked to state your verdict, in which case each of you should be prepared to do so.

At times during the trial the Court has been called upon to make a ruling on certain legal matters. That is a question involving law. Rulings on questions of law are
643 the concern of the Court solely. Your concern is solely with questions of fact and with the application of the Court's instructions to the testimony and the other evidence in the case, as those instructions relate for your determination of fact.

Your verdict must not be influenced by decisions on matters of law made by the Court during the trial except as those decisions are reflected in the Court's instructions to the jury.

Throughout the trial the Court has made rulings on the question whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings by the Court and are not to draw any inferences from them. Whether evidence that is offered is admissible is purely a question of law for the Court's determination.

In admitting evidence to which an objection is made

the Court does not determine what weight should be given to such evidence. A ruling by the Court, permitting testimony to be given or other evidence to be introduced, is not to be considered by you, the jury, as any indication as to what weight said testimony or other evidence may or may not have. What weight is to be given to the evidence is strictly a matter for you, the jury, to determine for yourselves.

Nor does the Court pass upon the credibility of
644 any witnesses who testified. A ruling by the Court, permitting a witness to testify or to give evidence, is not to be considered by you as any indication as to what the credibility of that witness may or may not be.

The credibility of a witness is, likewise, a matter strictly for you, the jury, to determine for yourselves. On the other hand, as to any offer of evidence which may have been rejected by the Court you, of course, must not consider such evidence and as to any question to which an objection was sustained you must not conjecture as to what the answer might have been or as to the reason for the objection or as to the ruling of the Court.

The Court instructs you that if there is conflict in the evidence in this case on any fact or circumstance, tending to establish either the guilt or the innocence of the defendants, a part of which is in favor of the theory of the Government and a part of which is in favor of the defendants, and you should entertain a reasonable doubt as to which is true, then it is your duty in arriving at your verdict to adopt the evidence or theory or conclusion which is most favorable to the defendants.

You have now heard the Court's instructions.

If in all of these instructions, from beginning to end, any rule, direction or idea be stated in varying ways,
645 that is, in different ways, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point of instruction and ignore the others,

but you are to consider all the instructions as a whole and to regard each in the light of all the others.

You may approach the Bench, gentlemen.

. . . . . .

650 (End of Bench conference.)

The Court: Now, ladies and gentlemen, the Court has read and explained to you the offenses with which these defendants are charged. The indictment charges the defendants in Count 1 with possession of lottery tickets; Count 2, setting up a gaming table; Count 3, maintaining of gambling premises; Count 4, accepting bets and wagers; Count 5, failure to pay the special occupational tax.

Your verdict in this case may be either guilty or not guilty as to each defendant on each count of the indictment.

As you know, your verdict must be unanimous. Before commencing your deliberations you will choose one of your members as foreman or forelady to lead you in your deliberations.

Whenever you shall have arrived at a verdict notify the Marshal, whereupon you will be escorted back to the courtroom to return your verdict through your fore-
651 man or forelady.

You will now, taking a copy of the indictment with you, proceed to your jury room for your deliberations, in charge of the Marshal.

. . . . . .

[fol. 256] [File endorsement omitted]

Supplemental Appendix to Appellee's Brief

In United States District Court

For the District of Columbia

Indictment—Filed July 30, 1958

Holding a Criminal Term

Grand Jury Impanelled May 1, 1958
Sworn in on May 6, 1958

Criminal No. 730-58
Grand Jury No. 697-58, 699-58, 698-58
Vio. 22D.C.C. 1505, 1504, 1502, 26 U.S.C. 7262

The United States of America,

v.

Julius Silverman, Robert L. Martin,
Meyer Schwartz.

The Grand Jury charges:

Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz did knowingly, as lessees, agents, operators and occupants, maintain, aid and permit the maintaining of a gambling premises located at 408 Twenty First Street, Northwest.

Second Count:

Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz set up and kept a gaming table for betting money on baseball games.

Third Count:

On or about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz had in their possession and under their control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in violation of Title 22, District of Columbia Code, Section 1504.

[fol. 257] Fourth Count:

Continuously during the period from about April 21, 1958, to about April 30, 1958, within the District of Columbia, Julius Silverman, Robert L. Martin and Meyer Schwartz were engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

Attorney of the United States in and for the District of Columbia.

A true bill:

* * * * * * *

Foreman.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Crim. No. 730-58

[Title omitted]

MOTION FOR RETURN AND SUPPRESSION OF EVIDENCE

Defendants hereby move this court to suppress and order the return of the fruits of the illegal search and seizure of the premises at 408 21st Street, N.W., in the District of Columbia, by which they were aggrieved within the purview of Rule 41 of the Federal Rules of Criminal Proce-

dure. Defendant Martin at all times pertinent to this case was lessee as well as an occupant of the aforesaid premises. Property was unlawfully seized at 5:20 p.m. on April 30, 1958, by one Sergeant William D. Foran of the Metropolitan Police Department. A schedule of said property is annexed hereto as Exhibit A. Defendants further move [fol. 258] this court to direct that any transcriptions, records, notes or other evidence, written or oral, or alleged conversations within said premises overheard by federal officers, including but not limited to the conversations referred to in the affidavit attached hereto as Exhibit B, be suppressed as evidence against them in any criminal proceedings.

In support of this motion, defendants rely upon the following grounds:

1. The property listed in Exhibit A was seized under the purported authority of a search warrant which was invalid because the supporting affidavit was based upon information secured in violation of their rights under the Fourth Amendment and § 605 of the Federal Communications Act, 47 U.S.C. § 605.

2. The search warrant was unlawfully executed.

3. There was not probable cause for believing the existence of the grounds on which the warrant was issued.

4. The alleged conversations were overheard by federal officers in violation of defendants' rights under the Fourth Amendment and § 605 of the Federal Communications Act, 47 U.S.C. § 605.

5. And such other and further reasons as may be presented at the oral hearing on this motion.

Edward Bennett Williams, Attorney for Defendant Silverman, 1000 Hill Building, Washington 6, D.C.

Myron G. Ehrlich, Attorney for Defendants Schwartz and Martin, 401 Third Street, N.W., Washington 1, D.C.

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[fol. 259]

In United States District Court
For the District of Columbia
Commissioner's Docket No. 6
Case No. 2798

United States of America,

v.

Premises: 408 21st Street N.W. (a Row House—Entire Premises), Washington, D.C., Listed to: Perry Fredericks per Phone Company Records.

Search Warrant

To Chief of Police, D.C., or Any Member of the Metropolitan Police, D.C., or Any Other Person Authorized to Execute Same:

Affidavit having been made before me by Det. Jesse R. Stone, Morals Div., MPDC, and Arnold G. Bedingfield and William H. Jewell, Spec. Agts., Int. Rev. Service, that he is positive[1] that on the premises known as 408 21st St., N.W. (a row-house—entire premises), Washington, in the District of Columbia, there is now being concealed certain property, namely any books, papers, memorandum, records, and any other gambling paraphernalia used for the purpose of setting up and wagering on the results of sporting events, i.e. the results of baseball games and prize fights. The facts to sustain this are as set forth in the affidavit attached hereto and made a part hereof, which are in violation of the D.C. Code, Title 22, Section 1504,

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property [fol. 260] before me within ten days of this date, as required by law.

Dated this 30th day of April, 1958.

James F. Splain, U.S. Commissioner.

RETURN

I received the attached search warrant April 30, 1958, and have executed it as follows:

On April 30, 1958, at 5:20 o'clock p.m., I searched the premises described in the warrant and

I left a copy of the warrant with Julius Silverman together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

A quantity of baseball and prize fight bet slips.
A quantity of records giving the odds on fight and baseball bets; fight performance records.
A large quantity of paper pads, pencils and related office supplies.
1 Pepco electric bill in name of Robert L. Martin.
3 Telephones, DI 7-3554-5 and 6.
2 table lamps, extension type for office use.
1 Numechron electric time clock.
1 Motorola "600" portable radio.
1 perforated metal basket.
2 pieces of cloth used for window blind.

This inventory was made in the presence of Insp. John B. Layton, Det. J. R. Stone and Meyer Schwartz.

I swear this Inventory is a true and detailed account of all property taken by me on the warrant.

Jesse R. Stone.

Subscribed and sworn to and returned before me this 1st day of May, 1958.

James F. Splain, United States Commissioner.

[fol. 261]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15186

JULIUS SILVERMAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 15258

MEYER SCHWARTZ, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 15259

ROBERT L. MARTIN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeals from the United States District Court for the District of Columbia

[fol. 262] *Mr. Edward Bennett Williams*, with whom *Mr. Thomas A. Wadden, Jr.*, and *Miss Agnes A. Neill* were on the brief, for appellants.

Mr. Thomas A. Flannery, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

OPINION—February 4, 1960

Before Wilbur K. Miller, Washington and Danaher, Circuit Judges.

Danaher, Circuit Judge: Appellants were jointly indicted on four counts charging, in one respect or other, violation of the District of Columbia Code proscribing gambling,[1] and on a fifth count which charged they had engaged in the business of accepting wagers without having paid the special tax required by the Internal Revenue Code.[2] They were acquitted of the charges in the fourth and fifth counts. Each appellant was sentenced to serve on the first and third counts, a term of imprisonment of nine months and to pay a fine of $500, and to serve on the second count a term of imprisonment of twenty months to five years. The sentences are to run concurrently. All were admitted to bail pending appeal.

I

Although appellants ask that the judgments of conviction be reversed as to the first and third counts, they particularly insist that a judgment of acquittal must be directed as to the second count.[3] They argue as to the

[1] D.C. Code §§ 22-1502, 1504, 1505, 1508.

[2] See generally Title 26 U.S.C. §§ 4401-23, 7262 (1958).

[3] This count charged that appellants "set up and kept a gaming table at premises located at 408 Twenty First Street, Northwest, for the purpose of betting on the results of baseball games, prize fights and boxing matches." Compare D. C. Code § 22-1507 (1951) which provides:

"All games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming

[fol. 263] latter, that the conviction "was vitiated by the absence of any physical device or place to which the public was invited."[4]

We reject this contention on the authority of *Beard* v. *United States*.[5] The only substantial difference between the "syndicate" operation in the *Beard* case and that conducted by these appellants is that *Beard* involved betting on horse races whereas the betting here was on prize fights and baseball games.

Plummer v. *United States*,[6] relied upon by appellants is clearly distinguishable on its facts as to appellant Plummer. The latter, a waiter in a well-known restaurant, simply placed bets for his customer with a "bookie" who sometimes frequented the place. We said the waiter was merely an accommodation intermediary. He had not set up the luncheon table as a gambling device or gaming table, we pointed out. The waiter's "complaisant" amiability did not make of him a felon.

Here, on the other hand, the evidence clearly shows that these three appellants were operating a betting office where they received wagers, established records of the wins and losses and kept accounts of their operations. That their activities were conducted by telephone is of no moment whatever. It is true that the public was excluded from their gambling office headquarters, but there is no require-[fol. 264] ment in the statute that the premises be open to the public. The statute defines as a felony not only the setting up of a gaming table, but the keeping of any house or place for the purpose of gaming. It reaches any operator who would permit any person to bet "on the side of or against the keeper thereof." The facts show that appellants accepted bets against themselves. The photographic exhibits in the record before us disclose a scene of opera-

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table within the meaning of sections 22-1504 to 22-1506; and the courts shall construe said sections liberally, so as to prevent the mischief intended to be guarded against."

[4] This quotation is taken from appellants' brief.

[5] 65 App. D.C. 231, 82 F.2d 837, *cert. denied*, 298 U.S. 655 (1936).

[6] 88 U.S. App. D.C. 244, 189 F.2d 19 (1951).

tions designed completely to facilitate the activities in which appellants were engaged.

We have examined the betting slips, the tally of wins and losses, and the records of the "line" of betting odds on various sports events. Bets ran into the thousands of dollars, one, for example, of $3,000 on April 23, 1958, that Detroit would win over Kansas City. Some 55 bet slips were recovered which were interpreted in the evidence as disclosing total bets in excess of $37,000 which were involved in the play on April 30, 1958. For part of one day "the house"—appellants'—paid out bets to players who had won the sum of $14,454, while appellants received a profit for that part day of $13,474. We have more particularly hereinafter noticed and taken account of other physical aspects of the major gambling operation conducted by the appellants. It would be sheer sophistry to say that some poolroom operator taking bets on horse races would be guilty under section 22-1504, or some numbers player could be convicted of accepting plays in the rear of a lunch room while these "big time" gamblers could go free because they conducted their activities over the telephone. The law commands no such absurd result nor do our cases suggest it.

II

Appellants also claim that a new trial must be granted in the interest of justice pursuant to Fed. R. Crim. P. 33 [fol. 265] in that the guilty verdict as to the first three counts is "clearly and irreconcilably inconsistent"[7] with their acquittal under counts four and five. They claim that an acquittal on the fourth count amounts to a jury finding that appellants did not accept wagers and that they "could not be guilty of keeping a gaming table and maintaining a gambling premises . . . unless they accepted wagers." In like vein, since "the evidence is uncontroverted" that appellants did not pay the tax required by the Internal Revenue Code of persons engaged in accepting wagers, "their acquittal under count five amounts to a finding that they did

[7] See cases collected at footnote 7 in Plummer v. United States, *supra* note 6.

[8] In this paragraph we again quote from appellants' brief.

not accept wagers," and "precisely the same activities were relied upon under all five counts of the indictment."

Again, we reject appellants' claim. As Judge Keech pointed out in *United States v. Daigle*,* rational consistency in a jury's verdict on each of several counts is not necessary. We need not here make further reference to the authorities he cited and which well establish the point.

III

On April 30, 1958, Metropolitan police officers and special agents of the Intelligence Division of the Internal Revenue Service converged on the row houses 402-4-6-8-10 Twenty First Street, N.W., roughly across from the State Department. Appellant Silverman came out of #408. Silverman was placed under arrest by an officer who identified himself, informed Silverman that he had a warrant for his arrest and that the officers had a search warrant authorizing [fol. 266] a search of the premises at #408 21st Street. Silverman produced a key ring, selected a key to fit the front door and unlocked the door. Officers with arrest warrants for Schwartz and Martin entered the premises and went to the second floor where the latter appellants were located in the front room. Schwartz and Martin also had keys to the front door of #408, and each had a key to a special lock on the door of the room in which they were found.

This was no private dwelling, but a betting business office. Large sections of black cloth covered the windows in that room. Two tables, side by side, filled the wall space between the front wall of the room and a closet. On the tables were three telephones, bearing numbers DIstrict 7-3554, DIstrict 7-3555 and DIstrict 7-3556, equipped with an automatic changeover device. Covering the entire wall between #406 and #408, behind the tables and the telephones, was a large rug.

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* 149 F. Supp. 409, 413, 414 (D.D.C.) and cases cited, *aff'd*, 101 U.S. App. D.C. 286, 248 F.2d 608 (1957), *cert. denied*, 355 U.S. 913 (1958). And see United States v. Meltzer, 100 F.2d 739 (7 Cir. 1938); Williams v. United States, 244 F.2d 303 (4 Cir. 1957).

Sealfon v. United States, 332 U.S. 575 (1948), relied upon by appellants is not to the contrary.

Other equipment included pads of paper, pencils, a filing cabinet, "line" sheets listing sports events and betting odds quoted with reference thereto, a bundle containing 55 bet slips representing bets which had been accepted on various baseball games played on April 30, 1958, and two slips on which had been recorded bets accepted on a prize fight.

The total bets thus recorded ran to $37,950. The "house" was shown, according to the testimony of an expert, to have had total winnings of $27,928 derived from various plays over part of the day.

Yet other exhibits of record included a tally sheet of bettors, or players who had telephoned in their bets. Amounts listed opposite their names in certain cases had been ringed in red pencil. Such entries indicated losses to the house, or as the expert put it, amounts owed by the house to a particular named player.

Over the 2½ hours or so as the officers listed the results of their search, the telephones rang continuously. The [fol. 267] calls were accepted by the police who supplied inquirers with the odds on such sporting events as were made the subject of the calls. Some of the callers asked specifically for one or another of the appellants and were given the information that they were not "available" so that the caller hung up.

Inspector Layton, testifying as an expert, traced out for the jury the significance of the bets, the relationship of $600 put up to win $500, for example; how odds were to be interpreted if a player put up $1,000 to the "house's" $1,350; what it meant if a player was told to "pick 'em," and, generally, how the bets were handled. Also in the room was a perforated metal basket bearing charred remains of burned paper.

No special purpose will be served by more extended reference to the scope of the betting operations as described by the officers. For how long and at the rate of just how many thousands of dollars per day the enterprise had continued could only be a matter of surmise. It was clear, however, that Martin had a year's written lease to #408 which had been executed October 18, 1957. He continued until November, 1958, to pay the rent to Woodward and Norris. Detailed testimony as to betting activities became

available at trial as to the period of April 21, 1958 to April 30, 1958 during which the gambling establishment was under surveillance for several hours on each of several days.

All such evidence clearly and overwhelmingly proved that the three appellants had maintained and operated that gambling establishment over the period named. There would be no question as to affirmance of their convictions on all three counts before us except for the last remaining predicate for this appeal. We thus come to appellants' contention that all evidence should have been suppressed.[10]

[fol. 268] Appellants claim that the officers acted in violation of appellants' Fourth Amendment rights and in violation of section 605 of the Communications Act of 1934, 47 U.S.C. § 605.

There can be no question that the affidavits before the Commissioner completely satisfied the requisite probable cause for the issuance of both the arrest warrants and the search warrant,[11] if the evidence was competent.

Here Metropolitan Police Inspector Layton about March 15, 1958, went to Woodward and Norris who were the owners of #410 - 21st Street, a vacant row house immediately adjoining #408. He asked for a key to #410 and for permission for his men to make observations from that house. His requests were granted.

Officers thereafter, on April 21, 1958, saw the three appellants leave #408. The next morning they reentered #408. The officers had inserted an antenna spike about 11¾ inches long under the baseboard of a room in #410. By connected ear phones, they then were able to overhear the appellants conducting their betting business, making telephone calls to Chicago, New York City, Miami, Columbus and elsewhere. So it went, on each of several suc-

[10] Appellants were first indicted in July, 1958. They moved for suppression of all evidence seized at #408 and also for the suppression of all conversations which had been monitored by police and Treasury officers from #410 - 21st Street, the row house next door. Their motion was denied. United States v. Silverman, 166 F. Supp. 838 (D.D.C. 1958). The trial went forward thereafter on a superseding indictment. Judge Jackson having accepted and relied upon Judge Holtzoff's earlier ruling, the officers over objection were permitted to testify to what they heard said by appellants in #408.

[11] Giordenello v. United States, 357 U.S. 480, 485, 486 (1958).

ceeding days, with two of the appellants doing the talking in #408 on several occasions, all three at other times. At times, an officer could overhear the appellants by merely placing his ear or a glass tumbler against the wall, it was testified.

[fol. 269] Had the officers utilized a device such as a detectaphone, there would seem to be no basis for complaint. *Goldman* v. *United States*[12] held such evidence competent. Its use to secure evidence by eavesdropping on Goldman's telephone calls violated neither the Fourth Amendment nor 47 U.S.C. § 605. The Supreme Court in *Goldman* was asked to overrule *Olmstead* v. *United States*,[13] but it refused to do so.

Here the antenna spike was said to have penetrated the party wall about half way. The record indicates that Judge Holtzoff and Judge Jackson might well have concluded that there was no physical trespass upon appellants' "half" of the party wall, since the wall itself was some thirteen to fourteen inches in thickness. We are asked to say that the spike might have penetrated 7⅛ inches through the wall so that a "trespass" occurred by as much as 5/16ths of an inch.

At stake is the Government's right to use the evidence procured through such electronic eavesdropping, in contrast with the immunities[14] secured to the appellants by the Fourth Amendment. We are unwilling to believe that the respective rights are to be measured in fractions of inches.

This is not the revolting "bugging" of the bedroom of man and wife, as in *Irvine* v. *California*.[15] Nor is it a case of wire-tapping.[16] Rather, in principle, it is not *such* un-

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[12] 316 U.S. 129 (1942).

[13] 277 U.S. 438 (1928).

[14] Cf. McGuire v. United States, 273 U.S. 95, 99 (1927); United States v. Lee, 274 U.S. 559, 563 (1927).

[15] 347 U.S. 128 (1954); even there the Court refused to find that the conduct or reception of the evidence violated 47 U.S.C. § 605. *Id.* at 131.

[16] Benanti v. United States, 355 U.S. 96 (1957), and cases cited, *e.g.*, Nardone v. United States, 302 U.S. 379 (1937) and 308 U.S. 338 (1939).

[fol. 270] lawful search and seizure as is proscribed by the Fourth Amendment, *On Lee* v. *United States*,[17] and equally there was no interference with any communications system within the proscription of 47 U.S.C. § 605.[18]

Appellants argued to us that the Supreme Court as now constituted would surely accept their contentions. They asked accordingly that we anticipate that eventuality and now rule in their favor. It is not our duty to speculate as to what the Supreme Court will say in the future; it is our duty to follow the Court's past rulings as we understand them. Under the existing authorities as we read them, the appellants failed to sustain their burden of demonstrating either to Judge Holtzoff or at trial that their Fourth Amendment rights were violated, or that the exclusion of the eavesdropped telephone conversations was required by 47 U.S.C. § 605. They have not convinced us that either judge erred.

Affirmed.

WASHINGTON, *Circuit Judge, dissenting:* Police use of an electronic eavesdropping device produced the essential evidence in this case. I would exclude evidence so obtained, along with any additional evidence which was its fruit, and would reverse the convictions.

The police gained entrance—quite legally—to the row house next to that occupied by appellants. They then carefully probed the brick party wall between the two houses in search of an advantageous spot for the insertion of their [fol. 271] eavesdropping device—a needle or spike about twelve inches long, connected to an amplifying circuit. The testimony indicated that the spike, in order to serve its purpose adequately, had to come in contact with a solid object capable of resonance. Mere insertion in the plaster or brick of the wall would be ineffective. The desired sound reception was obtained by inserting the spike about seven

[17] 343 U.S. 747, 751 (1952). There the Court pointed out that Goldman v. United States, *supra* note 12, had left open the effect of an earlier trespass "in order to install a listening device within the room itself."

[18] 343 U.S. at 754.

inches into the party wall, under the baseboard, at a point where the wall contained the metal heating duct for appellants' house. The heating duct was an excellent vibrator, and furthermore ran into the bedroom as well as the living room of appellants' house. Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants. The spike was the conductor by which sounds in appellants' house were transmitted to the amplifier in the adjoining house. Conversations on both floors of appellants' house were clearly heard by the police through earphones attached to the amplifier.

Whether the police, in installing and using the electronic device, committed a technical trespass upon appellants' property is a matter which seems immaterial to me. True, the import of *On Lee* v. *United States*, 343 U.S. 747 (1952), when read in the context of conflicting opinions in the same case by the judges in the Second Circuit, *United States* v. *On Lee*, 193 F.2d 306 (1951), and the earlier Supreme Court decisions in *Olmstead* v. *United States*, 277 U.S. 438 (1928), and *Goldman* v. *United States*, 316 U.S. 129 (1942), may perhaps be that the Fourth Amendment protects one's security in the home only to the extent of barring unauthorized physical entry of a person upon the premises of another. Thus, eavesdropping of the kind which occurred here may be held not to abridge any Fourth Amendment [fol. 272] rights. But it does violate, I think, our fundamental concept of ordered liberty, as embodied in the due process clauses of the Fifth and Fourteenth Amendments. See *Irvine* v. *California*, 347 U.S. 128 (1954); *Palko* v. *Connecticut*, 302 U.S. 319 (1937). Under a governmental system of constitutional or limited exercise of public power, ordered liberty requires that the police, like other public officials, take action against a citizen only pursuant to duly conferred authority.

The police actions in this case are inconsistent with such a view of ordered liberty. The Government has pointed to no statutory authority for what was done, and electronic

eavesdropping was surely not contemplated in common law concepts of legitimate police activity. Electronic eavesdropping today affords the police investigatory means which directly impair the right of the citizen to be free from unauthorized interference and surveillance by others. The latest contributions of modern electronics have far greater capacity for public evil than their earlier counterpart—the wiretap. Electronic devices—easily concealed and indiscriminate as to what is overheard—permit police officers to observe at will, for long periods and without detection, all the private affairs which transpire within a particular area. Such thoroughgoing and indiscriminate surveillance threatens legitimate interests in peace and security if only because the indiscreet, the idle, or the highly personal communications of innocent third parties may be overheard. And it is hardly necessary to mention the threat of electronic eavesdropping as a possible instrument of political oppression. The Supreme Court in *Irvine* condemned electronic eavesdropping where police invaded the privacy of the marriage chamber. I do not think, as do my brethren, that due process has such limited application. Here, the police overheard conversations in an entire house over a period of nine days. The officers were limited only by their own patience and endurance. It is true that evidence was [fol. 273] obtained showing these defendants to be guilty beyond a doubt of offenses under our statutes. But guilt cannot justify oppressive conduct by the police. The rights of these defendants were in my view seriously invaded.

For these reasons, I would reverse the convictions. I add that as to the other matters raised (see Points I, II and III of the majority opinion), I agree with my colleagues.

[fol. 274] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959.

Criminal 1135-58

No. 15,186

JULIUS SILVERMAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

September Term, 1959.

Criminal 1135-58

No. 15,258

MEYER SCHWARTZ, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

September Term, 1959.

Criminal 1135-58

No. 15,259

ROBERT L. MARTIN, Appellant.

v.

UNITED STATES OF AMERICA, Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Washington and Danaher, Circuit Judges.

JUDGMENT—February 4, 1960

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases are affirmed:

Per Circuit Judge Danaher.

Dated: Feb. 4, 1960

Separate dissenting opinion by Circuit Judge Washington.

[fol. 275] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,186

JULIUS SILVERMAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 15,258

MEYER SCHWARTZ, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 15,259

ROBERT L. MARTIN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

PETITION FOR REHEARING IN BANC—Filed February 18, 1960

Come now appellants by their attorneys and move this Court to permit rehearing before the Court in banc. It

is respectfully submitted that the issue summarized below is most appropriate for consideration by the full Court.[1] [fol. 276] On February 4, 1960, a divided panel of this Court affirmed appellants' convictions for violation of the District of Columbia gambling laws.[2] The panel recognized that virtually all of the prosecution's proof was obtained by electronic eavesdropping. Federal officers secured access to a row house adjoining appellants' premises and inserted a so-called spike microphone into the party wall between the two houses. As recognized by Judge Washington, every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with appellants' heating duct, as the officers admittedly hoped it would. When the spike touched the heating duct, "the duct became in effect a giant microphone, running through the entire house occupied by appellants."[3] The officers were able to hear everything said anywhere in the house.

Subsequently the officers secured a search warrant and raided appellants' premises. The search warrant was admittedly the fruit of conversations overheard with the microphone. Moreover, many of the conversations themselves were extensively quoted before the jury. It was conceded that appellants' convictions could not stand unless this Court was willing to approve the surreptitious introduction of electronic listening devices into private homes and offices.

The majority of the division which heard this case concluded that it was immaterial whether the officers committed a "trespass" by inserting the spike into appellants' "half" of the party wall. They went on to state: "This is not the revolting 'bugging' of the bedroom of man and wife, as in *Irvine* v. *California*. . . . Rather, in principle, it is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment, *On Lee* v. *United States*, . . ."[4]

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[1] *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247 (1953); Judge Harold M. Stephens, Address, 20 D.C.B.A.J. 103.

[2] D.C. Code §§ 22-1502, 22-1504, and 22-1505 (1951 ed.).

[3] Slip opinion, p. 11.

[4] Slip opinion, pp. 9-10.

[fol. 277] The dissenting judge agreed with the majority that it was immaterial whether the officers were guilty of a technical trespass. Even if the Fourth Amendment were held to be limited to physical entry by one person upon the premises of another, he concluded that the police actions in this case were inconsistent with the concept of ordered liberty which is embodied in the due process clause of the Fifth Amendment.

This case obviously raises a question of extraordinary public importance. It is a case without precedent but not without progeny. Results so spectacularly successful from a police point of view invite repetition. Federal officers across the country are given a mandate to experiment with every form of electronic eavesdropping. Indeed, as pointed out in appellants' original brief, the very type of device used in this case has already been used in an unspecified number of other cases.

Experience in other jurisdictions demonstrates that electronic surveillance is widely employed once its fruits are recognized as admissible. A recent study published under the auspices of the Pennsylvania Bar Association Endowment reports extensive police eavesdropping in all save one of the representative jurisdictions surveyed.[5] This study, moreover, reinforces appellants' assertion in their original brief that scientific advances are rendering the traditional "bug" obsolete.[6] It describes the very device used in this case.[7] It goes on to describe other devices which can be used to pick up a conversation within a room from without.[8] The police will soon find it unnecessary to enter premises by force or fraud in order to conceal a "bug"; newer de-[fol. 278] vices located outside of the premises will do the job more safely and surely.

The wide notice attracted by the bar study demonstrates profound public concern about this kind of law enforce-

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[5] Dash, Knowlton, and Schwartz, *The Eavesdroppers* (Rutgers University Press 1959), pp. 74-79, 136, 165, 174, 223-224, 251-252, 280-281.

[6] Appellants' Brief, pp. 23-24.

[7] *The Eavesdroppers*, p. 341.

[8] *The Eavesdroppers*, pp. 346, 358.

ment. There must also be profound judicial concern about this problem. It is certain to come before other divisions of this Court. Appellants respectfully urge that it should receive the consideration of the full Court now.

The division was in agreement that Fourth Amendment rights should not depend upon whether the officers committed a technical trespass. It was the government, however, and not the appellants who argued that the existence of a trespass was essential to exclusion. The government consistently and insistently urged that there was no trespass because the spike did not penetrate into appellants' "half" of the party wall and no officer entered appellants' premises during the surveillance period. The government took this position because, under the *Irvine* case,* electronic eavesdropping is concededly unconstitutional if accomplished by means of a trespass.

Appellants, on the other hand, took the position that a trespass is immaterial and that all electronic eavesdropping is illegal. Appellants urged that there is no real difference between the *Irvine* case, where officers entered petitioner's premises in his absence and secreted a microphone in his bedroom, and this case, where officers penetrated the wall of appellants' premises and placed a microphone against their heating duct. The only significant distinction is that the device in this case picked up conversations throughout the house, whereas the device in the *Irvine* case picked up conversations in only one room. In both cases, the gravamen of the defendant's complaint was the invasion of his privacy, and not the "trespass" to his bedroom or his party wall.

[fol. 279] When the majority accepted appellants' argument that constitutional rights should not be measured in fractions of an inch, they should also have recognized the applicability of the *Irvine* decision. This decision cannot be distinguished on the ground that it involved "the revolting 'bugging' of the bedroom of man and wife." It is settled that the protection of the Fourth Amendment also extends to offices, whether used for the transaction of legal or illegal

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* *Irvine* v. *California*, 347 U.S. 128 (1954).

business.[10] If the *Irvine* case is not distinguished on the ground that it involved a trespass, it cannot be distinguished at all. And if it cannot be distinguished, it compels reversal of appellants' convictions.

When the majority stated that this "is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment," they gave rise to other questions which should be considered by the full Court. Does the Fourth Amendment proscribe some unlawful searches and seizures but not others? If so, what is the touchstone to proscription?

Appellants also urge upon the Court another constitutional question raised by Judge Washington, but not considered by the other members of the panel. Is electronic eavesdropping consistent with the concept of ordered liberty embodied in the Fifth Amendment? The unseen but ever present police officer would seem more consistent with the concepts of totalitarianism. This far-reaching question should certainly be resolved by the full Court before a spike microphone becomes standard equipment for every police officer.

Conclusion

For the foregoing reasons, appellants respectfully submit that this motion for rehearing in banc should be granted. Appellants limit their motion to the issue dis- [fol. 280] cussed in this petition and do not request rehearing as to the other errors urged in their brief and discussed under Points I, II, and III of the majority opinion.

Edward Bennett Williams, Thomas A. Wadden, Agnes A. Neill, Counsel for Appellants, 1000 Hill Building, Washington 6, D.C.

Certificate of Good Faith

It is hereby certified that the petition is presented in good faith and not for delay.

Edward Bennett Williams

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[10] *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931); *Gouled* v. *United States*, 255 U.S. 298, 307 (1921); *United States* v. *Blok*, 88 U.S. App. D.C. 326, 188 F. 2d 1019 (1951).

[fol. 281] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—March 8, 1960

Upon consideration of appellants' petition for rehearing in banc, it is

Ordered by the court that the petition for rehearing in banc is denied.

Per Curiam.

Dated: March 8, 1960

[fol. 286] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 287]

SUPREME COURT OF THE UNITED STATES

No. 837, October Term, 1959

JULIUS SILVERMAN, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—May 31, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

OFFICE OF THE CLERK, U.S.
FILED
APR 6 1960
JAMES R. BROWNING, Clerk

No. 887 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No.

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming their convictions for violation of the District of Columbia gambling laws.

OPINIONS BELOW

The opinion of the District Court is reported at 166 F. Supp. 838 (R. 20). The opinion of the Court of Appeals has not yet been reported (App. 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1960, and a petition for rehearing was denied on March 8, 1960 (App. 13a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

D.C. Code § 22-1502 (1951 ed.), 52 Stat. 198, as amended, 67 Stat. 95:

> "If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof."

D.C. Code § 22-1504 (1951 ed.), 31 Stat. 1331:

> "Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by

imprisonment for a term of not more than five years."

D.C. Code § 22-1505 (1951 ed.), 31 Stat. 1331, as amended, 67 Stat. 95:

"(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 22-1501 or 22-1504, shall be deemed 'gambling premises' for the purpose of this section.

"(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

* * * * *

"(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than $1,000, or both, unless the violation occurs after he has been convicted of a violation of this section, in which case he may be imprisoned for not more than five years, or fined not more than $2,000, or both."

QUESTION PRESENTED

Whether evidence obtained by federal officers through the use of a spike microphone inserted into a party wall, which enabled them to overhear everything said in the contiguous private dwelling house occupied by petitioners, is admissible against petitioners in a federal court.

STATEMENT

A four-count indictment was returned against petitioners in the United States District Court for the District of Columbia on July 30, 1958 (R. 256-257).

They were charged with operating a gambling enterprise from April 21 to April 30, 1958, in violation of D.C. Code §§ 22-1502, 22-1504, 22-1505, and 26 U.S.C. § 7262.

Petitioners promptly moved for the return and suppression of all evidence obtained during a search of their premises at 408 21st Street, N. W., in the District of Columbia (R. 257-258). They alleged that the federal officers who conducted this search were armed with an invalid search warrant, because the supporting affidavit was based upon information secured in violation of their rights under the Fourth Amendment and § 605 of the Communications Act. This motion also sought suppression of all evidence as to conversations within their premises which had been overheard by federal officers.

Petitioners' motion came on for hearing before Judge Alexander Holtzoff (R. 39). It was stipulated by counsel for the government that federal officers secured permission from the owner of 410 21st Street, a vacant house separated from petitioners' premises by a party wall, to use the vacant house for purposes of observation (R. 40). It was further stipulated that the officers slipped an electronic listening device under the baseboard of a room in the vacant house, enabling them to overhear everything said in petitioners' premises (R. 40). Government counsel stipulated that the device had a spike twelve inches long, which was inserted into the party wall six or seven inches but which did not go completely through the wall (R. 43). It was not disputed that the officers subsequently secured a search warrant upon the basis of what they had overheard with this instrument.

Judge Holtzoff denied petitioners' motion on the ground that the protection of the Fourth Amendment is limited to physical searches and seizures of physical objects, citing *Olmstead* v. *United States*, 277 U.S. 438; and *Goldman* v. *United States*, 316 U.S. 129 (R. 21). The court went on to hold that there was no violation of § 605 of the Communications Act and that there was no "trespass" sufficient to distinguish the *Goldman* decision, despite the fact that the federal agents admittedly penetrated the wall with the spike of the microphone (R. 23-24).

Subsequently the government obtained a five-count superseding indictment because of a technical defect in its original indictment (R. 7-8).[1] Petitioner renewed their motion to suppress, which was denied without argument by Judge Luther Youngdahl upon the authority of the prior ruling (R. 9-10, 19).

The case came on for trial before Judge Joseph R. Jackson. Objections to testimony given by the officers who had overheard petitioners' conversations with the electronic eavesdropping device were overruled upon the authority of the pretrial rulings (R. 53).

Two special agents of the Internal Revenue Service and a member of the District of Columbia Metropolitan Police Department testified in detail concerning their electronic surveillance of petitioners' premises. Prior to April 21, 1958, they entered the vacant house to determine the feasibility of using an electronic listening device (R. 93). They made tests with a so-called spike microphone which was inserted under the base-

[1] The United States Attorney obtained a superseding indictment because the word "knowingly" had been omitted from the third count of the original indictment (R. 256). The superseding indictment added a count framed under D.C. Code § 22-1508.

board of the vacant house several feet from the front wall (R. 99-100). This device consisted of a microphone with a spike eleven and three-fourths inches long attached to it, together with an amplifier, a power pack, and an earphone (R. 101-103). It was inserted into the party wall approximately halfway, at which point it met with resistance, and it was capable of transmitting conversations which took place anywhere in petitioners' house (R. 84, 98, 104).

The officers knew that petitioners' heating duct was located inside the party wall at the point where they inserted the spike (R. 144-148). They considered the possibility that it was making contact with the duct. They knew that for maximum effectiveness this type of microphone must come into contact with something which acts as a sounding board (R. 156-158).

Formal surveillance began on April 21 and continued on April 22, 23, 24, and 29. The officers inserted the spike microphone into the party wall on each of these dates except April 29. They testified that they overheard petitioners quote odds and accept bets on baseball games and prize fights over the telephone. The officers quoted many of petitioners' conversations before the jury (R. 62-68, 85-90, 123-125).

The officers secured arrest and search warrants on April 30. These warrants were based upon an affidavit which was in turn based upon the conversations overheard with the spike microphone (R. 12-18). The warrants were executed on the same date, and the officers testified that they found records of odds and bets on petitioners' premises. These were subsequently introduced into evidence (R. 11, 128-131). The officers testified that while they were searching the premises

they answered telephone calls from persons who wanted to place bets (R. 137-139, 167-168, 181-183).

Petitioners introduced the testimony of three witnesses who had participated in various experiments on their premises. These witnesses testified that there was a space in the party wall directly behind petitioners' heating duct which was not filled in with bricks (R. 209-211). There was an oval indentation in the shoe mold of the vacant house directly behind petitioners' heating duct, and there was a dent in the duct which was the same size as the end of the spike microphone (R. 209, 213, 222-223). When a similar spike was inserted through the indentation in the shoe mold it hit this dent in the duct (R. 215, 229). It was impossible to insert a spike into the party wall at any other point (R. 216, 223-224, 234). When a spike microphone comes into contact with a duct of this type, the entire heating system becomes a conductor of sound and every heating register in the house becomes a microphone (R. 228-229).

The jury convicted petitioners under the first three counts of the indictment and acquitted them under the remaining two counts (R. 26-27). They were sentenced to imprisonment for nine months and fined $500 on counts one (D.C. Code § 22-1502) and three (D.C. Code § 22-1505), and to imprisonment for twenty months to five years on count two (D.C. Code § 22-1504), the sentences to run concurrently (R. 29-34). The trial court granted bail pending appeal.

The Court of Appeals affirmed by a divided bench. The majority distinguished *Irvine* v. *California*, 347 U.S. 128, on the ground that it involved "the revolting 'bugging' of the bedroom of man and wife" (App. 9a).

It went on to hold that electronic eavesdropping "is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment," citing *On Lee* v. *United States*, 343 U.S. 747. In a footnote, the majority stated that *On Lee* construed the *Goldman* case as leaving open the effect of an earlier trespass in order to conceal a listening device within defendant's premises.

Judge Washington filed a dissenting opinion. He pointed out that every inference and what little direct evidence there was pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would (App. 11a). The duct then became "a giant microphone" enabling the police to hear conversations on both floors of petitioners' house. In his view, it was immaterial whether the Fourth Amendment protects privacy only to the extent of banning unauthorized physical entry by the police, because he concluded that the conduct of the police violated our fundamental concept of ordered liberty, as embodied in the due process clause of the Fifth and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

The scientific advances during the past two decades in the field of electronic eavesdropping devices, the increasing frequency of their use by federal officers, and the resulting threat to the security of the people in their homes from unreasonable auditory searches by federal officers commend the evidentiary problems posed by this case to review by this Court.

1. The decision of the court below is squarely contrary to the views expressed by this Court in *Irvine* v. *California*, *supra*. Eight members of this Court there held that the conduct of the state officers con-

stituted an unlawful search and seizure. Irvine's conviction was permitted to stand only because the states are free to use the fruits of an unlawful search and seizure. Here, however, we are confronted with similar conduct by federal officers and convictions in a federal court.[2]

It is unclear whether the majority below distinguished *Irvine* on the ground that it involved "revolting" police conduct or on the ground that it involved a "trespass" by the police in order to install the listening device within Irvine's premises. Neither of these distinctions is tenable.

The protection of the Fourth Amendment has never been contingent upon the considerations which governed this Court's decision in *Rochin* v. *California*, 342 U.S. 165. The legality of a search does not depend upon the degree of judicial revulsion which it engenders. And certainly the *Irvine* case cannot be restricted to devices concealed in the bedroom of man and wife, as suggested by the majority below. It has long been settled that the protection of the Fourth Amendment also extends to offices, whether used for the transaction of legal or illegal business. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357; *Gouled* v. *United States*, 255 U.S. 298, 307.

Nor can the *Irvine* case be distinguished on the ground that it involved an earlier trespass by the police in order to install the listening device. This Court has repeatedly recognized that the Fourth Amendment is a protection of privacy. *Jones* v. *United States*, No.

[2] This case must be distinguished *in limine* from cases where a conversation is broadcast or transcribed with the consent of one participant, as in *On Lee* v. *United States*, *supra*. Cf. *Chapman* v. *United States*, 271 F. 2d 593, certiorari denied, March 28, 1960.

69, October Term, 1959, decided March 28, 1960; *Frank* v. *Maryland*, 359 U.S. 360, 362-363; *Miller* v. *United States*, 357 U.S. 301, 306-307. This protection cannot be reduced to a prohibition of physical entry.

The fact which called forth this Court's condemnation in *Irvine* was not that the police had entered Irvine's home on several occasions in his absence, but rather that the police had been able to overhear every word spoken by Irvine and his wife in their bedroom for over a month. It was this invasion of privacy which so "flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the federal government." 347 U.S. at 132. If a microphone had been inserted into Irvine's bedroom wall from outside of the premises, it would have been an equally flagrant, deliberate, and persistent violation of his privacy and hence of the fundamental principle declared by the Fourth Amendment.

This case illustrates the absurdity of requiring a "trespass" as a condition precedent to unconstitutionality. The government has consistently urged that there was no "trespass", because the spike microphone did not penetrate into petitioners' "half" of the party wall and no officer entered petitioners' premises. Since the party wall was thirteen to fourteen inches in thickness, government counsel argued that there could be no "trespass" unless the spike was inserted into the wall at least six and one-half inches. The government contended that it had actually been inserted only five and seven-eighths inches or less, although the evidence was uncontroverted that the spike had to penetrate more than half of the wall in order to make contact with the heating duct. According to the government's

theory, petitioners' constitutional rights were preserved by five-eighths of an inch.

If justice is to be thus meted out by the inch—or, in this case, by eighths of an inch—the Fourth Amendment becomes a mockery. It is precisely for this reason that petitioners have consistently denied any necessity for a "trespass" as a condition precedent to unconstitutionality.

The court below agreed that such important constitutional rights cannot be measured in fractions of an inch. It failed to recognize, however, that if a "trespass" is not a condition precedent to unconstitutionality, then petitioners' Fourth Amendment rights were seriously invaded.

Only last month this Court reversed another decision of the court below in this field. *Jones* v. *United States*, *supra*. In language equally applicable to this case, Justice Frankfurter concluded "that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."

Startling advances in the field of electronics have underscored the absurdity of the "trespass" concept. A recent study of wiretapping and eavesdropping published under the auspices of the Pennsylvania Bar Association Endowment shows that the traditional "bug" is rapidly becoming obsolete.[3] It describes con-

[3] Dash, Knowlton, and Schwartz, *The Eavesdroppers* (Rutgers University Press 1959), pp. 341, 346-358.

tact microphones similar to the device used in this case. It goes on to describe other devices, some in the production stage and some in the experimental stage, which can pick up conversations in a room from without. Surely the right of privacy guaranteed by the Fourth Amendment should not be contingent upon preservation of the scientific *status quo*.

Petitioners are at a loss to understand what the majority below meant when it said that this "is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment" (App. 9a). This apparent distinction between illegal searches and seizures that are unconstitutional and illegal searches and seizures that are permissible calls for review by this Court. Illegality negates permissibility. Any illegal search and seizure is unreasonable and therefore unconstitutional.

Even if this Court should be unwilling to condemn the "trespass" concept, moreover, it must conclude that petitioners' constitutional rights were seriously violated. Here there was no detectaphone clamped to the other side of an interior office wall, as in the *Goldman* case. The officers inserted their device deep into petitioners' party wall.[1] They brought this device into contact with petitioners' heating duct and thereby converted petitioners' entire heating system into "a giant microphone." If the law requires a trespass, petitioners have more than satisfied this requirement.

2. Judge Washington has raised a second constitutional question which should be considered by this

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[1] It should be noted that, under District of Columbia law, adjacent landowners hold title to a party wall as tenants in common of the entire wall. *Fowler* v. *Kochler*, 43 App. D.C. 349; *Moore* v. *Shoemaker*, 10 App. D.C. 6.

Court. In his view, it becomes immaterial whether the Fourth Amendment is restricted to cases where a police officer physically enters the premises. He concluded that the police actions in this case were inconsistent with the concept of ordered liberty embodied in the due process clause of the Fifth and Fourteenth Amendments.

This Court has long recognized the close relationship between the Fourth Amendment and the self-incrimination clause of the Fifth Amendment. *Boyd* v. *United States*, 116 U.S. 616. It should now consider the relationship between the Fourth Amendment and the due process clause of the Fifth Amendment. If the Fourth Amendment must be construed as narrowly as it was construed by the majority below, this Court must turn to the more compendious guarantee of the Fifth Amendment to control technological assaults upon basic freedoms.

3. Apart from constitutional considerations, petitioners urge that their convictions should be reversed in the exercise of this Court's supervisory power over the administration of justice in the lower federal courts. This power concededly covers the formulation of evidentiary rules. *Mesarosh* v. *United States*, 352 U.S. 1, 14; *Holland* v. *United States*, 348 U.S. 121, 135, n. 7; *McNabb* v. *United States*, 318 U.S. 332, 340; and see *On Lee* v. *United States*, *supra*, dissenting opinion of Mr. Justice Black.

Judge Washington's opinion stresses the dangers of indiscriminate electronic surveillance. Few law enforcement methods have more frightening potentialities. This Court should decide whether a strong and free society needs convictions secured by such devices

before a spike microphone becomes standard equipment for federal law enforcement officers.

4. This case also raises an important question left unanswered by this Court's opinion in *Rathbun* v. *United States*, 355 U.S. 107. There this Court held that § 605 does not prohibit listening on an extension telephone with the consent of one party to the conversation. It is clear from the dissenting opinion of Justice Frankfurter that the case would have been otherwise decided if neither party had consented to such conduct. It is hence clear that actual "interception" is not required under the statute.

The Court was not called upon to determine whether the statute protects each party to a telephone conversation from devices designed to transmit his side of the conversation. Logically there would seem to be no reason why the statute should protect the parties against a mechanical device which transmits both sides of the conversation but not against a mechanical device which transmits only one side of the conversation. The distinction is one of degree rather than substance. Since virtually all of the conversations here involved were telephone conversations, this interpretation of the statute compels reversal of petitioners' convictions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS,
THOMAS A. WADDEN, JR.,
AGNES A. NEILL,
Counsel for Petitioners.

April, 1960.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15186

JULIUS SILVERMAN, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 15258

MEYER SCHWARTZ, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 15259

ROBERT L. MARTIN, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeals from the United States District Court for the District of Columbia

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Decided February 4, 1960

Mr. Edward Bennett Williams, with whom *Mr. Thomas A. Wadden, Jr.*, and *Miss Agnes A. Neill* were on the brief, for appellants.

Mr. Thomas A. Flannery, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States

Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, *Circuit Judges*.

DANAHER, *Circuit Judge*: Appellants were jointly indicted on four counts charging, in one respect or other, violation of the District of Columbia Code proscribing gambling,[1] and on a fifth count which charged they had engaged in the business of accepting wagers without having paid the special tax required by the Internal Revenue Code.[2] They were acquitted of the charges in the fourth and fifth counts. Each appellant was sentenced to serve on the first and third counts, a term of imprisonment of nine months and to pay a fine of $500, and to serve on the second count a term of imprisonment of twenty months to five years. The sentences are to run concurrently. All were admitted to bail pending appeal.

I

Although appellants ask that the judgments of conviction be reversed as to the first and third counts, they particularly insist that a judgment of acquittal must be directed as to the second count.[3] They argue as to the latter,

[1] D.C. Code §§ 22-1502, 1504, 1505, 1508.

[2] See generally Title 26 U.S.C. §§ 4401-23, 7262 (1958).

[3] This count charged that appellants "set up and kept a gaming table at premises located at 408 Twenty First Street, Northwest, for the purpose of betting on the results of baseball games, prize fights and boxing matches." Compare D. C. CODE § 22-1507 (1951) which provides:

> "All games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of sections 22-1504 to 22-1506; and the courts shall construe said sections liberally, so as to prevent the mischief intended to be guarded against."

that the conviction "was vitiated by the absence of any physical device or place to which the public was invited."[4]

We reject this contention on the authority of *Beard* v. *United States*.[5] The only substantial difference between the "syndicate" operation in the *Beard* case and that conducted by these appellants is that *Beard* involved betting on horse races whereas the betting here was on prize fights and baseball games.

Plummer v. *United States*,[6] relied upon by appellants is clearly distinguishable on its facts as to appellant Plummer. The latter, a waiter in a well-known restaurant, simply placed bets for his customer with a "bookie" who sometimes frequented the place. We said the waiter was merely an accommodation intermediary. He had not set up the luncheon table as a gambling device or gaming table, we pointed out. The waiter's "complaisant" amiability did not make of him a felon.

Here on the other hand, the evidence clearly shows that these three appellants were operating a betting office where they received wagers, established records of the wins and losses and kept accounts of their operations. That their activities were conducted by telephone is of no moment whatever. It is true that the public was excluded from their gambling office headquarters, but there is no requirement in the statute that the premises be open to the public. The statute defines as a felony not only the setting up of a gaming table, but the keeping of any house or place for the purpose of gaming. It reaches any operator who would permit any person to bet "on the side of or against the keeper thereof." The facts show that appellants accepted bets against themselves. The photographic exhibits in the

[4] This quotation is taken from appellants' brief.

[5] 65 App. D.C. 231, 82 F. 2d 837, *cert. denied*, 298 U.S. 655 (1936).

[6] 88 U.S. App. D.C. 244, 189 F. 2d 19 (1951).

record before us disclose a scene of operations designed completely to facilitate the activities in which appellants were engaged.

We have examined the betting slips, the tally of wins and losses, and the records of the "line" of betting odds on various sports events. Bets ran into the thousands of dollars, one, for example, of $5,000 on April 23, 1958, that Detroit would win over Kansas City. Some 55 bet slips were recovered which were interpreted in the evidence as disclosing total bets in excess of $37,000 which were involved in the play on April 30, 1958. For part of one day "the house"—appellants'—paid out bets to players who had won the sum of $14,454, while appellants received a profit for that part day of $13,474. We have more particularly hereinafter noticed and taken account of other physical aspects of the major gambling operation conducted by the appellants. It would be sheer sophistry to say that some poolroom operator taking bets on horse races would be guilty under section 22-1504, or some numbers player could be convicted of accepting plays in the rear of a lunch room[7] while these "big time" gamblers could go free because they conducted their activities over the telephone. The law commands no such absurd result nor do our cases suggest it.

II

Appellants also claim that a new trial must be granted in the interest of justice pursuant to FED. R. CRIM. P. 33 in that the guilty verdict as to the first three counts is "clearly and irreconcilably inconsistent"[8] with their acquittal under counts four and five. They claim that an acquittal on the fourth count amounts to a jury finding that appellants did not accept wagers and that they "could not

[7] See cases collected at footnote 7 in Plummer v. United States, *supra* note 6.

[8] In this paragraph we again quote from appellants' brief.

be guilty of keeping a gaming table and maintaining a gambling premises, . . . unless they accepted wagers." In like vein, since "the evidence is uncontroverted" that appellants did not pay the tax required by the Internal Revenue Code of persons engaged in accepting wagers, "their acquittal under count five amounts to a finding that they did not accept wagers," and "precisely the same activities were relied upon under all five counts of the indictment."

Again, we reject appellants' claim. As Judge Keech pointed out in *United States* v. *Daigle*,[7] rational consistency in a jury's verdict on each of several counts is not necessary. We need not here make further reference to the authorities he cited and which well establish the point.

III

On April 30, 1958, Metropolitan police officers and special agents of the Intelligence Division of the Internal Revenue Service converged on the row houses 402-4-6-8-10 Twenty First Street, N.W., roughly across from the State Department. Appellant Silverman came out of #408. Silverman was placed under arrest by an officer who identified himself, informed Silverman that he had a warrant for his arrest and that the officers had a search warrant authorizing a search of the premises at #408 - 21st Street. Silverman produced a key ring, selected a key to fit the front door and unlocked the door. Officers with arrest warrants for Schwartz and Martin entered the premises and went to the second floor where the latter appellants were located in the front room. Schwartz and Martin also had keys to the front door of #408, and each had a key to a special lock on the door of the room in which they were found.

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[7] 149 F. Supp. 409, 413, 414 (D.D.C.) and cases cited, *aff'd*, 101 U.S. App. D.C. 286, 248 F. 2d 608 (1957), *cert. denied*, 355 U.S. 913 (1958). And see United States v. Meltzer, 100 F. 2d 739 (7 Cir. 1938); Williams v. United States, 244 F. 2d 303 (4 Cir. 1957). Sealfon v. United States, 332 U.S. 575 (1948), relied upon by appellants is not to the contrary.

This was no private dwelling, but a betting business office. Large sections of black cloth covered the windows in that room. Two tables, side by side, filled the wall space between the front wall of the room and a closet. On the tables were three telephones, bearing numbers DIstrict 7-3554, DIstrict 7-3555 and DIstrict 7-3556, equipped with an automatic changeover device. Covering the entire wall between #406 and #408, behind the tables and the telephones, was a large rug.

Other equipment included pads of paper, pencils, a filing cabinet, "line" sheets listing sports events and betting odds quoted with reference thereto, a bundle containing 55 bet slips representing bets which had been accepted on various baseball games played on April 30, 1958, and two slips on which had been recorded bets accepted on a prize fight.

The total bets thus recorded ran to $37,950. The "house" was shown, according to the testimony of an expert, to have had total winnings of $27,928 derived from various plays over part of the day.

Yet other exhibits of record included a tally sheet of bettors, or players who had telephoned in their bets. Amounts listed opposite their names in certain cases had been ringed in red pencil. Such entries indicated losses to the house, or as the expert put it, amounts owed by the house to a particular named player.

Over the 2½ hours or so as the officers listed the results of their search, the telephones rang continuously. The calls were accepted by the police who supplied inquirers with the odds on such sporting events as were made the subject of the calls. Some of the callers asked specifically for one or another of the appellants and were given the information that they were not "available" so that the caller hung up.

Inspector Layton, testifying as an expert, traced out for the jury the significance of the bets, the relationship of

$500 put up to win $500, for example; how odds were to be interpreted if a player put up $1,000 to the "house's" $1,350; what it meant if a player was told to "pick 'em," and, generally, how the bets were handled. Also in the room was a perforated metal basket bearing charred remains of burned paper.

No special purpose will be served by more extended reference to the scope of the betting operations as described by the officers. For how long and at the rate of just how many thousands of dollars per day the enterprise had continued could only be a matter of surmise. It was clear, however, that Martin had a year's written lease to #408 which had been executed October 18, 1957. He continued until November, 1958, to pay the rent to Woodward and Norris. Detailed testimony as to betting activities became available at trial as to the period of April 21, 1958 to April 30, 1958 during which the gambling establishment was under surveillance for several hours on each of several days.

All such evidence clearly and overwhelmingly proved that the three appellants had maintained and operated that gambling establishment over the periods named. There would be no question as to affirmance of their convictions on all three counts before us except for the last remaining predicate for this appeal. We thus come to appellants' contention that all evidence should have been suppressed.[10]

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[10] Appellants were first indicted in July, 1958. They moved for suppression of all evidence seized at #408 and also for the suppression of all conversations which had been monitored by police and Treasury officers from #410-21st Street, the row house next door. Their motion was denied. United States v. Silverman, 166 F. Supp. 838 (D.D.C. 1958). The trial went forward thereafter on a superseding indictment. Judge Jackson having accepted and relied upon Judge Holtzoff's earlier ruling, the officers over objection were permitted to testify to what they heard said by appellants in #408.

IV

Appellants claim that the officers acted in violation of appellants' Fourth Amendment rights and in violation of section 605 of the Communications Act of 1934, 47 U.S.C. § 605.

There can be no question that the affidavits before the Commissioner completely satisfied the requisite probable cause for the issuance of both the arrest warrants and the search warrant,[11] if the evidence was competent.

Here Metropolitan Police Inspector Layton about March 15, 1958, went to Woodward and Norris who were the owners of #410 - 21st Street, a vacant row house immediately adjoining #408. He asked for a key to #410 and for permission for his men to make observations from that house. His requests were granted.

Officers thereafter, on April 21, 1958, saw the three appellants leave #408. The next morning they reentered #408. The officers had inserted an antenna spike about 11¾ inches long under the baseboard of a room in #410. By connected ear phones, they then were able to overhear the appellants conducting their betting business, making telephone calls to Chicago, New York City, Miami, Columbus and elsewhere. So it went, on each of several succeeding days, with two of the appellants doing the talking in #408 on several occasions, all three at other times. At times, an officer could overhear the appellants by merely placing his ear or a glass tumbler against the wall, it was testified.

Had the officers utilized a device such as a detectaphone, there would seem to be no basis for complaint. *Goldman* v. *United States*[12] held such evidence competent. Its use to secure evidence by eavesdropping on Goldman's telephone

[11] Giordenello v. United States, 357 U.S. 480, 485, 486 (1958).

[12] 316 U.S. 129 (1942).

calls violated neither the Fourth Amendment nor 47 U.S.C. § 605. The Supreme Court in *Goldman* was asked to overrule *Olmstead* v. *United States*,[13] but it refused to do so.

Here the antenna spike was said to have penetrated the party wall about half way. The record indicates that Judge Holtzoff and Judge Jackson might well have concluded that there was no physical trespass upon appellants' "half" of the party wall, since the wall itself was some thirteen to fourteen inches in thickness. We are asked to say that the spike might have penetrated 7⅛ inches through the wall so that a "trespass" occurred by as much as 5/16ths of an inch.

At stake is the Government's right to use the evidence procured through such electronic eavesdropping, in contrast with the immunities[14] secured to the appellants by the Fourth Amendment. We are unwilling to believe that the respective rights are to be measured in fractions of inches.

This is not the revolting "bugging" of the bedroom of man and wife, as in *Irvine* v. *California*.[15] Nor is it a case of wire-tapping.[16] Rather, in principle, it is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment, *On Lee* v. *United States*,[17] and equally there

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[13] 277 U.S. 438 (1928).

[14] Cf. McGuire v. United States, 273 U.S. 95, 99 (1927); United States v. Lee, 274 U.S. 559, 563 (1927).

[15] 347 U.S. 128 (1954); even there the Court refused to find that the conduct or reception of the evidence violated 47 U.S.C. § 605. *Id.* at 131.

[16] Benanti v. United States, 355 U.S. 96 (1957), and cases cited, e.g., Nardone v. United States, 302 U.S. 379 (1937) and 308 U.S. 338 (1939).

[17] 343 U.S. 747, 751 (1952). There the Court pointed out that Goldman v. United States, *supra* note 12, had left open the effect of an earlier trespass "in order to install a listening device within the room itself."

was no interference with any communications system within the proscription of 47 U.S.C. § 605.[18]

Appellants argued to us that the Supreme Court as now constituted would surely accept their contentions. They asked accordingly that we anticipate that eventuality and now rule in their favor. It is not our duty to speculate as to what the Supreme Court will say in the future; it is our duty to follow the Court's past rulings as we understand them. Under the existing authorities as we read them, the appellants failed to sustain their burden of demonstrating either to Judge Holtzoff or at trial that their Fourth Amendment rights were violated, or that the exclusion of the eavesdropped telephone conversations was required by 47 U.S.C. § 605. They have not convinced us that either judge erred.

Affirmed.

WASHINGTON, *Circuit Judge, dissenting:* Police use of an electronic eavesdropping device produced the essential evidence in this case. I would exclude evidence so obtained, along with any additional evidence which was its fruit, and would reverse the convictions.

The police gained entrance—quite legally—to the row house next to that occupied by appellants. They then carefully probed the brick party wall between the two houses in search of an advantageous spot for the insertion of their eavesdropping device—a needle or spike about twelve inches long, connected to an amplifying circuit. The testimony indicated that the spike, in order to serve its purpose adequately, had to come in contact with a solid object capable of resonance. Mere insertion in the plaster or brick of the wall would be ineffective. The desired sound reception was obtained by inserting the spike about seven inches into the party wall, under the baseboard, at a point where the wall contained the metal heating duct for appellants' house. The heating duct

[18] 343 U.S. at 754.

was an excellent vibrator, and furthermore ran into the bedroom as well as the living room of appellants' house. Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants. The spike was the conductor by which sounds in appellants' house were transmitted to the amplifier in the adjoining house. Conversations on both floors of appellants' house were clearly heard by the police through earphones attached to the amplifier.

Whether the police, in installing and using the electronic device, committed a technical trespass upon appellants' property is a matter which seems immaterial to me. True, the import of *On Lee* v. *United States*, 343 U.S. 747 (1952), when read in the context of conflicting opinions in the same case by the judges in the Second Circuit, *United States* v. *On Lee*, 193 F.2d 306 (1951), and the earlier Supreme Court decisions in *Olmstead* v. *United States*, 277 U.S. 438 (1928), and *Goldman* v. *United States*, 316 U.S. 129 (1942), may perhaps be that the Fourth Amendment protects one's security in the home only to the extent of barring unauthorized physical entry of a person upon the premises of another. Thus, eavesdropping of the kind which occurred here may be held not to abridge any Fourth Amendment rights. But it does violate, I think, our fundamental concept of ordered liberty, as embodied in the due process clauses of the Fifth and Fourteenth Amendments. See *Irvine* v. *California*, 347 U.S. 128 (1954); *Palko* v. *Connecticut*, 302 U.S. 319 (1937). Under a governmental system of constitutional or limited exercise of public power, ordered liberty requires that the police, like other public officials, take action against a citizen only pursuant to duly-conferred authority.

The police actions in this case are inconsistent with such a view of ordered liberty. The Government has pointed to no statutory authority for what was done, and electronic eavesdropping was surely not contemplated in common law concepts of legitimate police activity. Electronic eavesdropping today affords the police investigatory means which directly impair the right of the citizen to be free from unauthorized interference and surveillance by others. The latest contributions of modern electronics have far greater capacity for public evil than their earlier counterpart—the wiretap. Electronic devices—easily concealed and indiscriminate as to what is overheard—permit police officers to observe at will, for long periods and without detection, all the private affairs which transpire within a particular area. Such thoroughgoing and indiscriminate surveillance threatens legitimate interests in peace and security if only because the indiscreet, the idle, or the highly personal communications of innocent third parties may be overheard. And it is hardly necessary to mention the threat of electronic eavesdropping as a possible instrument of political oppression. The Supreme Court in *Irvine* condemned electronic eavesdropping where police invaded the privacy of the marriage chamber. I do not think, as do my brethren, that due process has such limited application. Here, the police overheard conversations in an entire house over a period of nine days. The officers were limited only by their own patience and endurance. It is true that evidence was obtained showing these defendants to be guilty beyond a doubt of offenses under our statutes. But guilt cannot justify oppressive conduct by the police. The rights of these defendants were in my view seriously invaded.

For these reasons, I would reverse the convictions. I add that as to the other matters raised (see Points I, II and III of the majority opinion), I agree with my colleagues.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases are affirmed.

Per Circuit Judge Danaher.

Dated: Feb. 4, 1960

Separate dissenting opinion by Circuit Judge Washington.

Order

Upon consideration of appellants' petition for rehearing in banc, it is

Ordered by the court that the petition for rehearing in banc is denied.

Per Curiam.

Dated: March 8, 1960

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In the Supreme Court of the United States

OCTOBER TERM, 1959

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 837

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 275 F. 2 173. The opinion of the district court (J.A. 20) is reported at 166 F. Supp. 838.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1960 (Pet. App. 13a). A petition for rehearing *in banc* was denied on March 8, 1960 (Pet.

App. 13a). The petition for a writ of certiorari was filed on April 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was error to permit the use of evidence obtained by the police from a listening post on the other side of a wall adjoining the petitioner's gambling establishment, where the sounds of voices, sometimes spoken into telephones, were magnified through the use of a battery-operated amplifier attached to a wire-like antenna inserted halfway into the party wall.

STATEMENT

In the United States District Court for the District of Columbia the petitioners were found guilty on three counts charging gambling offenses. Each of the petitioners was sentenced to imprisonment for nine months and to pay a fine of $500 on counts one and three, and to imprisonment for twenty months to five years on count two, the sentences to run concurrently (J.A. 30-34). The court of appeals affirmed, one judge dissenting.

The only issue raised is the admissibility of evidence alleged to have been obtained illegally, which also formed the basis for a search warrant. A motion to suppress was denied before trial, *United States* v. *Silverman*, 166 F. Supp. 838 (D. D.C.), on the renewal of the motion after a superseding indictment had been returned (J.A. 9, 19), and at trial (J.A. 46-53).

The evidence on this issue (some of which was stipulated at the pre-trial hearing on the motion to suppress) was as follows:

On March 15, 1958, the owners of 410 21st St., N.W., a vacant row house immediately adjoining 408, gave the Metropolitan Police a key with permission to use the premises as an observation post (J.A. 169-170). On April 22, 1958, police and federal Internal Revenue agents entered 410. They had with them a small battery operated device—a box two or three inches square, with attached amplifier and microphone, into which there was screwed a small antenna about 11¾ inches long (J.A. 71, 84, 102). One officer, using only his thumbs, pushed the antenna underneath the baseboard in a room in 410 in the one spot where he knew, from a prior test, it would penetrate (J.A. 94, 100, 115, 142). The antenna entered the 13 or 14 inch wall about half way (J.A. 61, 84, 100, 122-123, 143, 161) until it met with resistence (J.A. 110, 117). The testing officer surmised that the antenna might have hit a heating duct serving 408, but he was not looking for the duct and he was not certain of this. He knew the antenna had hit a good sounding board (R. 143-145, 158).

With the antenna in place, and with the aid of a set of earphones, the officers could hear the petitioners in 408 carrying on their betting business through both local and long distance telephone calls, quoting odds and accepting wagers (J.A. 62-64). On occasion the officers could hear and distinguish words with the naked ear (J.A. 68-69, 73, 80, 106-107, 124, 151). At times they also used an inverted water tumbler

held against the wall (106-107, 152). They listened to operations on April 22-25 (J.A. 62-68, 84-91, 120-125), and on April 29 without the mechanical device (J.A. 68-69), taking records of innumerable betting transactions (J.A. 109). On April 30, 1958, on the basis of this and other information they obtained search and arrest warrants which were executed that afternoon (J.A. 70, 126). A search of the premises revealed that three telephones were set up (and ringing constantly) in a second-floor room in which a wall had been covered with a rug and windows covered with black cloth (J.A. 128, 177). They found betting paraphernalia including bet slips, collection slips, sporting event schedules and "line" (odds quotations) sheets (J.A. 128, 131, 187-188) revealing that petitioners had accepted as much as $37,950 in bids on one day (R. 188).

The rulings below

Both the district court, in denying the petitioner's motion to suppress, and the court of appeals, in affirming the convictions below, found no violation of the Fourth Amendment or the Federal Communications Act, holding this case to be governed by *Goldman* v. *United States*, 316 U.S. 129. In the court of appeals, the dissenting judge held that, while the police action might not have violated the Fourth Amendment, it did violate a concept of ordered liberty embodied in the Fifth Amendment.

ARGUMENT

This Court has repeatedly and uniformly held that the Fourth Amendment does not ban eavesdropping. Thus in *Olmstead* v. *United States*, 277 U.S. 438, 464 (1928), in holding that the Fourth Amendment did not forbid wiretapping where no entry was made on the defendant's property, the Court noted, "The evidence was secured by the use of the sense of hearing and that only." Fourteen years later in *Goldman* v. *United States*, 316 U.S. 129 (1942), this Court relied upon, and refused to overrule *Olmstead*, in holding that the use by federal agents of a detectaphone placed against the wall of an office adjoining that of the defendants was not a violation of the Fourth Amendment. And ten years thereafter in *On Lee* v. *United States*, 343 U.S. 747 (1952), the Court again ruled that eavesdropping with the aid of a mechanical or electronic device was not within the prohibition of the Fourth Amendment. It held that the use of a "walky-talky" radio to transmit a defendant's conversation with an informer from his place of business to an agent outside had the same effect on the defendant's privacy as if the agent had been eavesdropping outside an open window, and observed (343 U.S. at 754):

> * * * It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure.

The circumstances of this case, practically indistinguishable from those of *Goldman*, *supra*, do not warrant a re-examination of this area of law. This was a conventional case of eavesdropping. The officers were stationed outside the petitioners' gambling establishment in a place where they had permission to be. From this point they overheard petitioners carrying on gambling transactions on the other side of the wall, sometimes with the naked ear, mostly with the aid of battery-operated earphones and an amplifier. The only possible distinction between this case and *Goldman* was the presence here of a small antenna, 11¾ inches in length and of the circumference of the wire in a coat hanger (see J.A. 141-142), which was pushed half-way into the party wall by the agents with their thumbs. The petitioners argued initially in their motion to suppress (R. 41, 43) that the insertion of this antenna constituted a trespass and thus distinguished this case from *Goldman*. At trial their defense was directed toward showing that the depth of penetration of the spike into the party wall was a fraction more than halfway—by the testimony of the witness most favorable to them, penetration of 7 1/8 inches into a 13 or 14 inch wall (J.A. 215). On the other hand, the testimony of three government witnesses was in agreement that the spike did not penetrate the wall beyond the half way mark (J.A. 61, 84, 122). We need not detail the evidence of the various minute calculations. The courts' holdings below represent, we think, a proper conclusion that, even if the petitioners' version of the facts be

accepted, this would not be a valid basis for distinguishing this case from *Goldman*.[1]

In this Court, the petitioners, while they do not altogether abandon the argument that there was a trespass (see Pet. 12), urge "the absurdity of requiring a 'trespass' as a condition precedent to unconstitutionality" (Pet. 10). We see no occasion in this case for arguing the effect or lack of effect of a trespass *per se* in obtaining evidence. What is an unreasonable search and seizure under the Fourth Amendment must be determined on the totality of the circumstances, and trespass has always been a factor considered by this Court in evaluating police conduct. See *Olmstead*, *supra*, 277 U.S. at 465; *Irvine* v. *California*, 347 U.S. 128, 132, 133. That it is not the decisive factor is shown by *Hester* v. *United States*, 265 U.S. 57, 58, where conduct was held reasonable even though there was a technical trespass.[2]

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[1] Thus the district court, in ruling on the motion to suppress observed (J.A. 24): "*De mininis non curat lex*. It would be, in the opinion of the Court, almost ludicrous to draw a line of distinction between legality and illegality on such minute circumstances. Moreover, the Court does not feel that inserting a wire into a party wall actually constitutes a trespass."

In the Court of Appeals, Circuit Judge Danaher speaking for the majority said (Pet. App. 9a), "We are unwilling to believe that the respective rights are to be measured in fractions of inches." Judge Washington, dissenting, noted that the question of whether a technical trespass was committed seemed immaterial to him.

[2] In *On Lee* v. *United States*, 343 U.S. at 751, the Court did not consider the effect of a trespass since it found no trespass. It noted that On Lee had seized upon "dictum" in

Our position is made clear by noting the distinctions between the circumstances of this case and those of *Irvine* v. *California*, *supra*, 347 U.S. 128, relied upon by the petitioners. There, police secretly had a key made to Irvine's home. They bored a hole in the roof. With the aid of the key they entered the home repeatedly to install a secret microphone and to move it about from time to time, even into the bedroom of Irvine and his wife, in order to get better reception at a listening post in a neighboring garage. They entered the home finally with the key to arrest Irvine and they searched the house without a search warrant. The majority of the Court, noting that such police measures would have violated the Fourth Amendment, observed that each of the entries was a trespass and probably a burglary for which an unofficial person should and probably would be severely punished.

There was no such situation here. There was no invasion of the sanctity of the home. There was in fact no physical entry, no actual, and, we believe, no technical trespass. There was no unauthorized search. There was no force nor fraud. There was only listening with the aid of an amplifier.

For these reasons the police conduct here did not violate the due process clause of the Fifth Amendment. This was not aggravated coercive conduct

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Goldman on the apparent assumption that the presence of a radio set plus a trespass would automatically bring him within what was thought to be a reservation of that question.

offensive to civilized standards of decency and fairness (cf. *Rochin* v. *California*, 342 U.S. 165); it does not represent powerful control over the personal lives of citizens (cf. *Irvine*, *supra*, 347 U.S. at 145, Mr. Justice Frankfurter dissenting). What was done here was no more than what has already been held legal. This Court can deal with abuse when abuse occurs.

Similarly, this case presents no occasion for the exercise of this Court's supervisory power over the administration of justice to formulate a rule of exclusion of evidence. The conduct of the officers did not violate a federal statute. Cf. *McNabb* v. *United States*, 318 U.S. 332. And as this Court noted in *On Lee* v. *United States*, *supra*, 343 U.S. at 755, departures from primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy. There are no reasons for such action here more compelling than those urged in that case.[3]

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[3] There is no merit to petitioners' argument that the facts of this case call for the consideration of whether the federal Communications Act should protect against the use of a mechanical device which transmits one side of a telephone conversation. That is a matter for Congress, not this Court. Use of such a listening device is not wiretapping within the meaning of that Act: *Goldman*, *supra*, 316 U.S. at 133-134; *Irvine* v. *California*, *supra*, 347 U.S. at 131. The case of *Rathbun* v. *United States*, 355 U.S. 107, is inapposite.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

JULIUS SILVERMAN, MEYER SCHWARTZ, and ROBERT L. MARTIN, *Petitioners*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court is reported at 166 F. Supp. 838 (R. 29). The opinion of the Court of Appeals is reported at 275 F. 2d 173 (R. 261).

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1960 (R. 272), and a petition for rehearing in banc was denied on March 8, 1960 (R. 278). The petition for a writ of certiorari was filed on April 6, 1960, and was granted on May 31, 1960. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

D. C. Code § 22-1502 (1951 ed.), 52 Stat. 198, as amended, 67 Stat. 95:

> "If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof."

D. C. Code § 22-1504 (1951 ed.), 31 Stat. 1331:

> "Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years."

D. C. Code § 22-1505 (1951 ed.), 31 Stat. 1331, as amended, 67 Stat. 95:

> "(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia used or to be used

in violating the provisions of section 22-1501 or 22-1504, shall be deemed 'gambling premises' for the purpose of this section.

"(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

* * * * *

"(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than $1,000, or both, unless the violation occurs after he has been convicted of a violation of this section, in which case he may be imprisoned for not more than five years, or fined not more than $2,000, or both."

U. S. Code § 47-605, c. 652, 48 Stat. 1103:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall re-

ceive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Rule 41, Federal Rules of Criminal Procedure:

"(a) **Authority to Issue Warrant.** A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

"(b) **Grounds for Issuance.** A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957.

"(c) **Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

. . .

QUESTION PRESENTED

Whether evidence obtained by federal officers through the use of a spike microphone inserted into a party wall, which enabled them to overhear everything said in the contiguous private dwelling house occupied by petitioners, is admissible against petitioners in a federal court.

STATEMENT

A four-count indictment was returned against petitioners in the United States District Court for the District of Columbia on July 30, 1958 (R. 256-257). They were charged with operating a gambling enterprise

from April 21 to April 30, 1958, in violation of D. C. Code §§ 22-1502, 22-1504, 22-1505, and 26 U.S.C. § 7262.

Petitioners promptly moved for the return and suppression of all evidence obtained during a search of their premises at 408 21st Street, N. W., in the District of Columbia (R. 257-258). They alleged that the federal officers who conducted this search were armed with an invalid search warrant, because the supporting affidavit was based upon information secured in violation of their rights under the Fourth Amendment and § 605 of the Communications Act. This motion also sought suppression of all evidence as to conversations within their premises which had been overheard by federal officers.

Petitioners' motion came on for hearing before Judge Alexander Holtzoff (R. 39). It was stipulated by counsel for the government that federal officers secured permission from the owner of 410 21st Street, a vacant house separated from petitioners' premises by a party wall, to use the vacant house for purposes of observation (R. 40). It was further stipulated that the officers slipped an electronic listening device under the baseboard of a room in the vacant house, enabling them to overhear everything said in petitioners' premises (R. 40). Government counsel stipulated that the device had a spike twelve inches long, which was inserted into the party wall six or seven inches but which did not go completely through the wall (R. 43). It was not disputed that the officers subsequently secured a search warrant upon the basis of what they had overheard with this instrument.

Judge Holtzoff denied petitioners' motion on the ground that the protection of the Fourth Amendment is

limited to physical searches and seizures of physical objects, citing *Olmstead* v. *United States*, 277 U.S. 438, and *Goldman* v. *United States*, 316 U.S. 129 (R. 21). The court went on to hold that there was no violation of § 605 of the Communications Act and that there was no "trespass" sufficient to distinguish the *Goldman* decision, despite the fact that the federal agents admittedly penetrated the wall with the spike of the microphone (R. 23-24).

Subsequently the government obtained a five-count superseding indictment because of a technical defect in its original indictment (R. 7-8).[1] Petitioners renewed their motion to suppress, which was denied without argument by Judge Luther Youngdahl upon the authority of the prior ruling (R. 9-10, 19).

The case came on for trial before Judge Joseph R. Jackson. Objections to testimony given by the officers who had overheard petitioners' conversations with the electronic eavesdropping device were overruled upon the authority of the pretrial rulings (R. 53).

Two special agents of the Internal Revenue Service and a member of the District of Columbia Metropolitan Police Department testified in detail concerning their electronic surveillance of petitioners' premises. Prior to April 21, 1958, they entered the vacant house to determine the feasibility of using an electronic listening device (R. 93). They made tests with a so-called spike microphone which was inserted under the baseboard of the vacant house several feet from the front

[1] The United States Attorney obtained a superseding indictment because the word "knowingly" had been omitted from the third count of the original indictment (R. 256). The superseding indictment added a count framed under D. C. Code § 22-1508.

wall (R. 99-100). This device consisted of a microphone with a spike eleven and three-fourths inches long attached to it, together with an amplifier, a power pack, and an earphone (R. 101-103). It was inserted into the party wall approximately halfway, at which point it met with resistance, and it was capable of transmitting conversations which took place anywhere in petitioners' house (R. 84, 98, 104).

The officers knew that petitioners' heating duct was located inside the party wall at the point where they inserted the spike (R. 144-148). They considered the possibility that it was making contact with the duct. They knew that for maximum effectiveness this type of microphone must come into contact with something which acts as a sounding board (R. 156-158).

Formal surveillance began on April 21, and continued on April 22, 23, 24, 25, and 29. The officers inserted the spike microphone into the party wall on April 22, 23, and 24. They testified that they overheard petitioners quote odds and accept bets on baseball games and prize fights over the telephone. The officers quoted many of petitioners' conversations before the jury (R. 62-68, 85-90, 123-125).

The officers secured arrest and search warrants on April 30. These warrants were based upon an affidavit which was in turn based upon the conversations overheard with the spike microphone (R. 12-18). The warrants were executed on the same date, and the officers testified that they found records of odds and bets on petitioners' premises. These were subsequently introduced into evidence (R. 11, 128-131). The officers testified that while they were searching the premises

they answered telephone calls from persons who wanted to place bets (R. 137-139, 167-168, 181-183).

Petitioners introduced the testimony of three witnesses who had participated in various experiments on their premises. These witnesses testified that there was a space in the party wall directly behind petitioners' heating duct which was not filled in with bricks (R. 209-211). There was an oval indentation in the shoe mold of the vacant house directly behind petitioners' heating duct, and there was a dent in the duct which was the same size as the end of the spike microphone (R. 209, 213, 222-223). When a similar spike was inserted through the indentation in the shoe mold, it hit this dent in the duct (R. 215, 229). The spike had to be inserted into the wall seven and one-eighth inches before it came into contact with the duct (R. 215, 234-235). It was impossible to insert a spike into the party wall at any other point (R. 216, 223-224, 234). When a spike microphone comes into contact with a duct of this type, the entire heating system becomes a conductor of sound and every heating register in the house becomes a microphone (R. 228-229).

One of petitioners' expert witnesses was an electronics engineer specializing in sound acoustics. He testified that normal conversation is carried on at a level of sixty-five decibels (R. 225). The lowest decibel level which could be understood through the party wall with the naked ear is eighty-seven decibels (R. 225). A conversation carried on at seventy-five decibels could be heard through the wall as noise, but it was impossible to distinguish the words spoken (R. 230-231).

The jury convicted petitioners under the first three counts of the indictment and acquitted them under the

remaining two counts (R. 26-27). They were sentenced to imprisonment for nine months and fined $500 on counts one (D. C. Code § 22-1502) and three (D. C. Code § 22-1505), and to imprisonment for twenty months to five years on count two (D. C. Code § 22-1504), the sentences to run concurrently (R. 30-34). The trial court granted bail pending appeal.

The Court of Appeals affirmed by a divided bench. The majority distinguished *Irvine* v. *California*, 347 U.S. 128, on the ground that it involved "the revolting 'bugging' of the bedroom of man and wife" (R. 268). It went on to hold that electronic eavesdropping "is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment," citing *On Lee* v. *United States*, 343 U.S. 747. In a footnote, the majority stated that *On Lee* construed the *Goldman* case as leaving open the effect of an earlier trespass in order to conceal a listening device within defendant's premises.

Judge Washington filed a dissenting opinion. He pointed out that every inference and what little direct evidence there was pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would (R. 270). The duct then became "a giant microphone" enabling the police to hear conversations on both floors of petitioners' house. In his view, it was immaterial whether the Fourth Amendment protects privacy only to the extent of banning unauthorized physical entry by the police, because, he concluded, the conduct of the police violated our fundamental concept of ordered liberty, as embodied in the due process clause of the Fifth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

The insertion of an electronic listening device into petitioners' party wall constitutes a clear violation of the Fourth Amendment. Evidence so obtained cannot be used to convict petitioners in a federal court.

In *Irvine* v. *California, supra,* this Court held that the concealment of an electronic eavesdropping device in petitioner's home constituted a flagrant violation of the fundamental principle declared by the Fourth Amendment as a restriction on the federal government. This holding cannot be emasculated by restricting it, as did the majority below, to cases where the device is concealed in the bedroom of man and wife. Nor can it be restricted to cases where the police commit a "trespass" upon the premises in order to install the device. This Court has repeatedly recognized that the Fourth Amendment is a protection of privacy. Any electronic eavesdropping device which destroys privacy is unconstitutional, regardless of where it is located or how it is installed.

Even if this Court should restrict the *Irvine* holding to "trespass" cases, petitioners' Fourth Amendment rights were violated. When the police inserted their device into petitioners' party wall and brought it into contact with petitioners' heating duct, the entire heating system was transformed into a giant microphone. This microphone picked up every word that was said anywhere in the entire house. Surely this constitutes an aggravated "trespass" sufficient to satisfy the most restrictive interpretation of the Fourth Amendment.

The conduct of the police in this case also violated the due process clause of the Fifth Amendment. In

Wolf v. *Colorado*, 338 U.S. 25, this Court held that the right of privacy is implicit in the concept of ordered liberty. In the *Irvine* case, Justice Frankfurter held the use of electronic listening devices is violative of due process. While state courts are free to admit into evidence the fruits of an illegal search and seizure, the federal courts are held to a stricter standard.

Apart from constitutional considerations, petitioners' convictions must be reversed in the exercise of this Court's supervisory power over the administration of justice in the lower federal courts. The admission at trial of evidence obtained by concealed electronic eavesdropping devices does not comport with the standards of decency and fairness essential to criminal trials in the federal courts. Observance of the untainted administration of justice is "one of the most cherished aspects of our institutions." *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115.

The evidence used to convict petitioners was also secured in violation of the Communications Act, 47 U.S.C. § 605. Virtually all of the incriminating conversations overheard by means of the electronic listening device were telephone conversations. The law protects both sides of a telephone conversation and it prohibits the use of any devices enabling a third party to overhear either or both participants. Cf. *Rathbun* v. *United States*, 355 U.S. 107.

ARGUMENT

I. The Government's Evidence Was Secured in Violation of Petitioners' Rights Under the Fourth Amendment

The Fourth Amendment must be construed to secure to the people an absolute immunity from arbitrary searches and seizures, whether by physical ransacking or electronic eavesdropping. Where evidence is obtained in violation of this fundamental right it must be excluded from use in a federal court.

In this case it is undisputed that the search warrant was the fruit of petitioners' conversations overheard through the use of an electronic listening device. While the officers conducting this intrusion upon petitioners' privacy testified that on occasion they could hear conversations through the party wall with the naked ear, it has never been suggested that they heard enough with the naked ear to justify the issuance of a search warrant. Moreover, virtually all of the conversations which the officers repeated at trial in the presence of the jury were overheard by means of the spike microphone. Consequently, petitioners' convictions must be reversed unless this Court condones the surreptitious introduction of electronic listening devices into private homes and offices.

Prior decisions of this Court compel the conclusion that such police practices are unconstitutional. In *Boyd* v. *United States*, 116 U.S. 616, this Court struck down a statute requiring importers to produce their invoices or admit the government's allegation as to the contents of the invoices. In reversing a judgment of forfeiture, this Court expressly rejected the contention that a physical search and seizure is prerequisite to an unreasonable search and seizure. The opinion discussed Lord Camden's decision in *Entick* v. *Carring-*

ton, 19 How. St. Tr. 1030, and concluded, 116 U.S. at 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense;—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

A somewhat more restrictive interpretation of the Fourth Amendment was enunciated in *Olmstead* v. *United States*, *supra*, where this Court held that wiretapping does not violate the Fourth Amendment because the Amendment condemns only the search for and seizure of "material things."

This "materialistic" interpretation called forth strong dissents from Justices Holmes, Brandeis, Butler and Stone. Justice Brandeis called upon the Court to construe the Constitution in light of changing circumstances, stating, 277 U.S. at 473-474:

"But 'time works changes, brings into existence new conditions and purposes'. Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

"Moreover, 'in the application of a constitution, our contemplation cannot be only of what has been but of what may be.' The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. *Ways may some day be developed by which the Government,* without removing papers from secret drawers, can reproduce them in court, and by which it *will be enabled to expose to a jury the most intimate occurrences of the home.* Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That places the liberty of every man in the hands of every petty officer,' was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?" (Emphasis added.)

In 1940 this Court first had occasion to consider the constitutionality of electronic eavesdropping, as distinguished from wiretapping. *Goldman* v. *United States, supra,* involved a detectaphone placed against the wall of one defendant's office by federal officers. The officers actually entered the office to conceal a microphone, but when it failed to operate they relied upon the outside device. By a five-to-three decision, this Court ruled that the officers had not violated de-

fendants' rights under either § 605 of the Communications Act or the Fourth Amendment, citing *Olmstead*. The majority held that the admitted trespass was immaterial because the device installed inside of the office never functioned.

Chief Justice Stone and Justice Frankfurter dissented on the ground that *Olmstead* should be overruled. Justice Murphy wrote a separate dissenting opinion in which he stated, 316 U.S. at 139, 141:

> "There was no physical entry in this case. But the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. Surely the spirit motivating the framers of that Amendment would abhor these new devices no less. Physical entry may be wholly immaterial. Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by agents of the Government and intimate personal matters are laid bare to view.
>
> * * * * * * *
>
> "It is strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters, thoughts perhaps too intimate to be set down even in a secret diary, or indeed, utterances about which the common law drew the cloak of privilege—the most confidential revelations between husband and wife, client and lawyer, patient

and physician, and penitent and spiritual adviser. Nor can I see any rational basis for denying to the modern means of communication the same protection that is extended by the Amendment to the sealed letter in the mails."

Three years after Justice Murphy's death, the *Goldman* case was followed by a five-to-four decision in *On Lee* v. *United States, supra.* There an undercover agent of the Bureau of Narcotics, armed with a concealed radio transmitter, entered the customers' room of petitioner's laundry and engaged him in an incriminating conversation. Another agent stationed outside of the premises picked up the entire conversation with a receiving set and related what he had heard at the trial. On the authority of *Goldman* a majority held that petitioner's rights under the Fourth Amendment had not been violated. The majority found it unnecessary to discuss the constitutional consequences of a trespass, since it concluded that the facts did not disclose a trespass.

Implicit in the dissenting opinions is a deep-seated distaste for police methods which indiscriminately intrude upon private affairs. Justice Burton, joined by Justice Frankfurter, urged that the Fourth Amendment must be construed to proscribe the unlawful seizure of intangibles, such as spoken words. Justice Black urged that the evidence should be excluded in the exercise of this Court's supervisory authority over the lower federal courts. Both Justice Frankfurter and Justice Douglas concluded that *Olmstead* and *Goldman* should be overruled.

The conversation overheard in *On Lee* occurred in a quasi-public place and was broadcast with the consent

and cooperation of one participant.[2] The Solicitor General conceded that a different result might be compelled if science should develop a way of intercepting "truly private conversations." At page 28 of his brief on the merits, the Solicitor General referred to the dissenting opinion of Judge Frank in the Court of Appeals and stated:

> "The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publicize conversations within a private home are unrelated to the instant case. As has been observed above, a private home is not here involved; the conversation transpired in a place to which the public was invited. In any event, if science should in the future perfect instruments which seriously invade truly private conversations, the validity of such developments may be considered as they appear."

"Truly private conversations" became the subject of this Court's consideration in *Irvine* v. *California; supra.* There, state officers made a key to petitioner's house, entered in his absence, and installed a concealed microphone in the hall. On a second occasion the officers moved the microphone to a bedroom occupied by petitioner and his wife, where it remained for more than a month. When petitioner was tried for violation of state gambling statutes, the officers testified as to conversations overheard by means of the microphone.

At issue in *Irvine* was not whether petitioner's Fourth Amendment rights had been violated, but only

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[2] Cf. *Rathbun* v. *United States*, 355 U.S. 107, holding it was not a violation of § 605 of the Communications Act for an officer to listen on an extension phone with the consent of one party to the conversation.

whether his conviction had been obtained in violation of the due process clause of the Fourteenth Amendment. In resolving this question, eight members of this Court concluded that the officers' conduct constituted an unreasonable search and seizure. The majority, however, concluded that petitioner's conviction should be affirmed on the authority of *Wolf* v. *Colorado, supra.*

The decision of the court below in this case is squarely contrary to the views expressed in *Irvine.* Justice Jackson, with the concurrence of the Chief Justice and Justices Reed and Minton, stated, 347 U.S. at 132:

> "Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government: . . ."

Justice Clark concurred in this result "with great reluctance" and only because a majority of the Court were unwilling to overrule *Wolf,* thus indicating his belief that the officers were guilty of an unreasonable search and seizure. Justices Frankfurter and Burton dissented on the authority of *Rochin* v. *California,* 342 U.S. 165, stating, 347 U.S. at 145-146:

> "Certainly the conduct of the police here went far beyond a bare search and seizure. The police de-

> vised means to hear every word that was said in the Irvine household for more than a month. . . . Considering the progress that scientific devices are making in extracting evidence without violence or bodily harm, satisfaction of due process would depend on the astuteness and subtlety with which the police engage in offensive practices and drastically invade privacy without authority of law. In words that seem too prophetic of this case, it has been said that '[d]iscovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.' Brandeis, J., dissenting in *Olmstead* v. *United States*, . . ."

Justice Douglas dissented on the ground that *Wolf* should be overruled. He stated, 347 U.S. at 149:

> "The search and seizure conducted in this case smack of the police state, not the free America the Bill of Rights envisaged."

The opinions in the *Irvine* case have profound significance here for two reasons. In the first place, they unmistakably extend the protection of the Fourth Amendment to the spoken word. They lay to rest forever the "materialistic" interpretation suggested by *Olmstead* and *Goldman*. They destroy the "strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters." *Goldman* v. *United States*, 316 U.S. 129, 141, dissenting opinion of Justice Murphy.

In the second place, the *Irvine* opinions demonstrate a profound judicial concern with the protection of privacy. Concededly the police conduct in *Irvine* consti-

tuted a trespass. Concededly also it was not the trespass which called forth the condemnation of this Court. The fact which so disturbed this Court was that the police had overheard every word spoken by Irvine and his wife in their bedroom for over a month. This was the police conduct which "so flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment." The fact that the police had entered Irvine's home on several occasions in his absence to accomplish their objectives was of secondary significance.

If the police had been able to overhear Irvine's conversations by means of a microphone inserted into his bedroom wall from the exterior of the premises or even by means of a microphone attached to the outside of his bedroom window, it would have been an equally flagrant, deliberate, and persistent violation of his privacy and hence of the fundamental principle declared by the Fourth Amendment. The protection of great constitutional principles cannot depend upon acoustical problems.

As was so forcefully recognized many years ago in the *Boyd* case, breaking into a house and rummaging through drawers are only "circumstances of aggravation." It can make no difference to the victim whether the police are listening to his conversations with a device concealed inside or outside of his premises. Indeed, a device concealed outside of the premises is more frightening because even the most painstaking search will not uncover it.

The absurdity of hinging constitutional rights upon the purely adventitious factor of location is underscored by scientific progress in this field. Inside de-

vices may soon become completely obsolete. Recent congressional hearings[3] have elicited testimony about a device known as the parabolic microphone which can pick up a conversation three hundred yards away. There was also testimony concerning a still experimental technique whereby a room is flooded with a certain type of sonic wave. When perfected this technique will make it possible to overhear everything said in a room without ever entering it or even going near it.

These techniques are discussed at some length in a widely heralded study published under the auspices of the Pennsylvania Bar Association Endowment.[4] This study describes contact microphones similar to the spike microphone used here and suggests that they have wide utility. It goes on to describe parabolic microphones which can pick up a conversation through an open office window on the opposite side of a busy street. It further concludes that a radio microphone could be constructed to pick up conversations in a distant room. This device would be similar to the technique discussed at earlier congressional hearings. The bar study concludes:[5]

> "If devices of the type described are admitted as a possibility, defense against eavesdropping becomes a very specialized task, one which is no

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[3] Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2nd Sess., on Wiretapping, Eavesdropping, and the Bill of Rights; Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., on Wiretapping.

[4] Dash, Knowlton & Schwartz, *The Eavesdroppers*, (Rutgers University Press, 1959), pp. 341, 346-358.

[5] Id. at 358.

> longer in the realm of the private investigator, but rather in that of the physicist or engineer. To foil an ultrasonic beam is not too difficult, since it has difficulty in passing through solid or porous substances. With a microwave beam the situation is quite different. . . . To be certain of defense against any eavesdropping of this kind (and incidentally, against wireless microphones as well), one should shield his room completely with continuous covering of aluminum foil and substitute for his window glass a special conducting glass made by several of the large glass companies . . . ."

This case forcefully illustrates the absurdity of making constitutional rights contingent upon preservation of the scientific status quo. The government urged in the courts below that there was no violation of petitioners' constitutional rights because the spike microphone did not penetrate into petitioners' half of the party wall and no officer entered petitioners' premises. Since the party wall was thirteen to fourteen inches in thickness, government counsel argued that there could be no "trespass" unless the spike was inserted into the wall at least six and one-half inches. The government contended that it had actually been inserted only five and seven eighths inches or less, although the evidence was uncontroverted that the spike had to penetrate more than half of the wall in order to make contact with the heating duct.

According to the government's theory, petitioners' constitutional rights were preserved by five-eighths of an inch. Excerpts from the government's brief in the Court of Appeals which set forth this arithmetical argument are included as an appendix to this brief.

If justice is to be thus meted out by the inch—or, in this case, by eighths of an inch—the Fourth Amend-

ment becomes a mockery. It is precisely for this reason that petitioners have consistently denied any necessity for a trespass as a condition precedent to unconstitutionality.

The Court of Appeals agreed that such important constitutional rights cannot be measured in fractions of an inch. The majority failed to recognize, however, that if a "trespass" is not a condition precedent to unconstitutionality, then petitioners' Fourth Amendment rights were seriously invaded.

Only last term this Court refused to condition the protection of the Fourth Amendment upon technical concepts of tort law. *Jones* v. *United States*, 362 U.S. 257. In language equally applicable to this case, Justice Frankfurter concluded "that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." 362 U.S. at 266.

It is interesting to note that the executive branch of the government is not unanimous in condoning all eavesdropping accomplished without a "trespass." The American Ambassador to the United Nations recently protested to the Security Council concerning a wireless microphone and transmitter employed by the Soviet Union.[8] This device was concealed in a carved replica of the seal of the United States presented to the Ambassador in Moscow. The Ambassador

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[8] *New York Times*, May 27, 1960, p. 1, cols. 5, 8; p. 3, col. 1; p. 30, col. 1.

placed it above his desk, where it reportedly enabled Russian agents outside of the Embassy to overhear conversations within the Ambassador's office for seven years.

No Russian agent entered the American Embassy for the purpose of installing this device, and hence there was no "trespass." The Department of State, however, did not regard the absence of a "trespass" as legitimatizing the Russians' conduct.

Petitioners have taken the position that *Goldman* was impliedly overruled by the *Irvine* opinions and that it should now be expressly overruled. If this Court should be unwilling to overrule *Goldman* at the present time, however, petitioners' convictions must still be reversed. Even if we should accept the continuing validity of the *Goldman* result, this case is clearly distinguishable on two grounds. In *Goldman* the listening device was affixed to one side of a partition wall in an office building. In this case the device was actually inserted into a party wall, and petitioners' entire heating system was, in Judge Washington's words, transformed into "a giant microphone" (R. 270).

In the District of Columbia, adjacent landowners hold title to a party wall as tenants in common.[7] The owner of the premises in question had an undivided interest in the entire party wall which passed to petitioners when they leased the premises. When the police inserted an electronic device into this wall without petitioners' knowledge or consent, they were violating petitioners' property rights. It becomes immaterial whether the spike penetrated more than half

[7] *Fowler* v. *Koehler*, 43 App. D.C. 349; *Moore* v. *Shoemaker*, 10 App. D.C. 6.

of the wall, because any substantial penetration violated petitioners' rights.

The owner of the adjacent premises could not authorize the police to insert a listening device into the party wall because he had no authority to do so himself. It is settled that equity will compel a landowner to close up windows in a party wall.[8] The same result should certainly be reached if a landowner affixes listening devices in a party wall. Neither visual nor auditory surveillance is consonant with the purposes for which party walls are permitted.[9] Regardless of whether the adjacent landowner *could* have consented to insertion of the device, there is no evidence that he *did* consent. Permission to use the premises for "observation" cannot be construed to authorize what was done in this case.

The second distinguishing factor between *Goldman* and this case was stressed below by Judge Washington. This was not an ordinary case of eavesdropping from outside of the victim's premises. Here the record compels the conclusion that the spike microphone was in continuous contact with petitioners' heating duct. Every heating register in the house became in effect a microphone. It was only by converting petitioners' heating system into a giant microphone that the police were able to overhear every word spoken in every part of the house.

This technique is analogous to converting a defendant's telephone into a microphone which picks up every

[8] *Bartley* v. *Spaulding*, 21 D.C. 47; *Corcoran* v. *Nailor*, 6 Mackey (17 D.C.) 580.

[9] See Note, 27 Geo. Wash. L. Rev. 735.

word said in the room even when the receiver is on the hook.[10] At present it is necessary to enter the premises in order to convert a telephone into a microphone. Concededly the Fourth Amendment bars evidence secured in this way. But it may one day be possible to convert a telephone into a microphone by changes made in the wiring outside of the victim's premises. Surely the Fourth Amendment must also bar evidence secured in this way, regardless of whether this Court is now prepared to rule that it bars evidence secured by any kind of electronic listening device unless one party to the conversation consents.

Even if the right of privacy conferred by the Fourth Amendment is not unlimited, it must surely protect the individual against police eavesdropping which converts his heating system or his telephone system into a network of microphones. Neither *Goldman* nor any other decision of this Court confers this kind of authority upon federal officers.

II. The Government's Evidence Was Obtained in Violation of Petitioners' Rights Under the Fifth Amendment

Judge Washington, dissenting in the court below expressed the view that the conduct of the police officers in this case was violative of our fundamental concept of ordered liberty as embodied in the due process clause of the Fifth and Fourteenth Amendments, citing *Irvine* v. *California*, *supra*, and *Palko* v. *Connecticut*, 302 U.S. 319. Under this view it becomes immaterial whether the Fourth Amendment is restricted to cases where there is an actual trespass.

[10] Dash, Knowlton & Schwartz, *op. cit.* at 339-340.

This Court has on previous occasions recognized that the right of privacy protected by the Fourth Amendment is implicit in "the concept of ordered liberty" and as such enforceable against the states through the due process clause of the Fourteenth Amendment. *Wolf* v. *Colorado*, 338 U.S. 25, 27-28. Due process is not, however, so limited in its application as to relate only to seizures in violation of the Fourth Amendment. It must of necessity encompass practices which offend our traditional sense of justice. *Rochin* v. *California*, 342 U.S. 165.

Justice Frankfurter, dissenting in *Irvine*, commented on the conduct of the police officers as follows, 347 U.S. at 145-146:

> "Certainly the conduct of the police here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month. . . . Considering the progress that scientific devices are making in extracting evidence without violence or bodily harm, satisfaction of due process would depend on the astuteness and subtlety with which the police engage in offensive practices and drastically invade privacy without authority of law. . . ."

Similarly in this case the conduct of the police went beyond a bare search and seizure. Moreover, the existence or nonexistence of a trespass is not crucial to a determination of whether the conduct in question violated due process, for the ultimate evil to be guarded against is invasion of privacy without authority of law. Thus where particular conduct of police officers may not be violative of the Fourth Amendment because of the absence of a trespass, it may still be pro-

scribed by the due process clause of the Fifth Amendment.

Surely our sense of justice and our concept of ordered liberty require that police take action against citizens only pursuant to duly conferred authority as suggested by Judge Washington in the court below, and by Justice Frankfurter in *Irvine*. The conduct of the police officers in this case puts a premium upon force and fraud to achieve expeditious law enforcement.[11] To tolerate such practices as are revealed here is but to invite further refinements in the effective and unrestricted use of electronic surveillance devices. Law enforcement must be tempered with fairness and objectivity; to tolerate employment of electronic eavesdropping devices, whether inside the home or out, does not conform with such requirements.

Eavesdropping, such as occurred in this case, raises graver and more serious problems than presented by wiretapping. This is especially so because of the fact that the eavesdropper today is not only unseen but virtually undetectable. The public is to some extent on guard against wiretapping, but there is no way to be on guard against electronic eavesdropping. The grim fact is that no conversation can be really immune to advanced electronic eavesdropping devices.

Issuance of a search warrant has long excluded authority to conduct a general search for evidence. See e.g., *Harris* v. *United States*, 331 U.S. 145, 154; *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466; *Gouled* v. *United States* 255 U.S. 298, 309. Eavesdropping, on the other hand, constitutes nothing less than such a

[11] See *On Lee* v. *United States*, 343 U.S. 747, 760-761, dissenting opinion of Justice Frankfurter.

search for evidence. Unlike wiretapping, which might under certain circumstances be defended as a search for the instruments of crime, eavesdropping is tantamount to the ancient writ of assistance. Every single conversation in office or home may be made the subject of public information in police efforts to trap the criminal. The modern luxury of the glass house becomes a liability. For adequate protection one must search for the deepest cave to elude his overseers and attain the privacy so long cherished in our society.

The facts in the instant case demonstrate the potential danger of such instruments. Every part of the premises which petitioners occupied was subject to continuous surveillance, limited only by the physical capacities of the officers. That personal conversations of husband and wife, confessor and penitent, or attorney and client might have been the subject of such surveillance need hardly be mentioned.

Traditionally, action against private citizens which is potentially oppressive has been controlled by the judiciary. Thus warrants are issued only on probable cause. In the field of electronic eavesdropping, however, there is no such insulation from oppression. Answering to no one or no thing, the police officers are restricted by their consciences only. Due process does not contemplate such unbounded authority in the hands of the police. The exclusionary rule of *Weeks* v. *United States*, 232 U.S. 383, must apply under these circumstances.

III. In the Exercise of this Court's Supervisory Power over the Administration of Justice in the Lower Federal Courts the Government's Evidence Against Petitioners Should Be Ruled Inadmissible

Unquestionably this Court, in exercise of its supervisory powers over the federal courts, has authority to formulate rules of evidence. *Mesarosh* v. *United States*, 352 U.S. 1; *Holland* v. *United States*, 348 U.S. 121, 135 n. 7; *Communist Party* v. *Subversive Activities Control Board*, *supra*; *McNabb* v. *United States*, 318 U.S. 332, 340; and see *On Lee* v. *United States*, *supra*, dissenting opinion of Justice Black.

In *McNabb*, this Court found inadmissible incriminating statements made by the petitioners during a period of unlawful detention. The statements in question were excluded not upon constitutional grounds, but upon standards of procedure and evidence formulated by this Court. As stated by Justice Frankfurter in writing for the majority, 318 U.S. at 340-341:

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. . . .
>
> "The principles governing the admissibility of evidence in Federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. . . . And in formulating such rules of evidence for Federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

On this basis it was not necessary in *McNabb* to reach the constitutional question raised by the petitioners. So, too, in this case, aside from the constitutional issues raised, the evidence adduced against petitioners should be excluded to insure the untainted administration of justice.

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts." *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124. Use of evidence obtained through the surreptitious use of electronic eavesdropping devices does not comport with this standard. While the conduct of the police in the instant case may not have been in violation of any statute or express rule of law, neither was it conduct adhering to any duly-conferred authority. Certainly such electronic eavesdropping was never contemplated in "common law concepts of legitimate police activity." *Silverman* v. *United States*, dissenting opinion of Judge Washington (R. 271).

Moreover, the power of this Court to formulate rules of evidence in the exercise of its supervisory power over the administration of justice is not dependent upon the existence of a federal statute as suggested by the Solicitor General in his brief in opposition to the petition for certiorari. Considerations wholly apart from the Constitution, federal statutes or the principles of relevance may necessitate the adoption of particular rules. Cf. *McNabb* v. *United States, supra; Communist Party* v. *Subversive Activities Control Board, supra.*

Consideration of the dangers and potential abuses inherent in the indiscriminate use of devices such as

the spike microphone compels the conclusion that the dignity of the federal courts should not be sacrificed to law enforcement methods so derisive of individual liberty and security. "The dignity of the United States Government will not permit the conviction of any person on tainted evidence." *Mesarosh* v. *United States*, 352 U.S. 1, 9. In light of these considerations all evidence obtained by electronic eavesdropping should be excluded in the federal courts.

IV. Evidence of Petitioners' Telephone Conversations Obtained Through Use of an Electronic Listening Device, Not Connected to the Telephone Apparatus, Was Obtained in Violation of § 605 of the Communications Act

In *Rathbun* v. *United States*, 355 U.S. 107, this Court held that listening on an extension telephone with the consent of one party to a conversation does not violate § 605 of the Communications Act, 47 U.S.C. § 605. From the dissenting opinion of Justice Frankfurter it is apparent that a contrary result would obtain if neither party to the conversation consented to the use of the extension telephone. Petitioners submit that, at the very least, the law prohibits the use of a mechanical or electronic device to overhear any part of a telephone conversation unless one party consents. Physical interception of the entire conversation is not the touchstone to illegality. To hold otherwise would permit simultaneous eavesdropping at each end of a telephone conversation with impunity. Such circumvention of § 605 would render its interdictions meaningless.

In *Rathbun* the officers intercepting petitioner's telephone conversation did so at the direction of the second party to the conversation. Chief Justice Warren, writing for the majority, compared this use

of a telephone extension to the holding out of the handset so another person could hear what was being transmitted. 355 U.S. at 110-111. A different result would obtain if the officers had surreptitiously used the extension telephone, or had they used a microphone sufficiently powerful to pick up Rathbun's conversation at a substantial distance from the receiver without the consent of the other party to the conversation. Cf. *United States* v. *Hill*, 149 F. Supp. 83.

Surely the fact that the police officers in this case used an electronic device at the sending end rather than the receiving end of the conversation does not render their conduct without the purview of § 605. Section 605 must be construed to protect each party to a telephone conversation from devices designed to intercept his part of the conversation. *Irvine* v. *California*, *supra*, and *Goldman* v. *United States*, *supra*, notwithstanding, there is no logical reason to support a construction of § 605 which affords protection to the entire conversation but does not protect each separate end of it. Such a distinction is one of form and not of substance.

Noteworthy in both the *Irvine* case and the *Goldman* case is the apparent fact that those portions of the respective petitioners' telephone conversations introduced in evidence did not constitute a vital part of the prosecution's proof against them. The telephone conversations were overheard incidental to the overhearing of entire face to face conversations. Such is not the situation in the case at bar, for here virtually the entire basis for the prosecution rests upon petitioners' telephone conversations. Moreover, the suggestion in *Goldman* that a conversation is protected only while in transit and not at the moment it leaves the sender

is unrealistic in view of the fact that transmission of sound by electrical impulse travels at the speed of light, or 186,000 miles per second.[12]

This issue should be considered in light of the observation of Mr. Justice Frankfurter in *Nardone* v. *United States*, 308 U.S. 338, 340, commenting on the first *Nardone* case, 302 U.S. 379:

> "That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.'"

Petitioners likewise do not urge a "meticulous reading of technical language." They urge a construction of § 605 which is essential to the sensible application of the Communications Act.

CONCLUSION

For the foregoing reasons, petitioners urge that the judgments of the court below should be reversed and the case remanded to the District Court with directions to enter judgments of acquittal as to the petitioners.

Respectfully submitted,

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August, 1960

[12] See *United States* v. *Hill*, 149 F. Supp. 83, 85, n. 5.

APPENDIX

Extract from Appellee's brief (pp. 18-20) in the United States Court of Appeals for the District of Columbia Circuit, *Silverman* v. *United States*, 275 F. 2d 173:

"The only difference between the present case and the *Goldman* case is that here a spike was inserted into a party wall no more than halfway to aid the officers in hearing the conversations of the appellants. In the present case there was no physical intrusion into the room of the appellants. The device used was only a refinement of the detectiaphone used in *Goldman*. The officers had good reason to believe that the appellants were engaged in illegal activities. The listening device was installed only after the officers had gained the consent of the owner and had legally entered 410 21st Street, N. W.

"Mere use of the mechanical aids to the human senses, e.g., a field glass or a searchlight without any physical intrusion on to premises has never been regarded as converting observation into search. *United States* v. *Lee*, 274 U.S. 559 (1927); *Smith* v. *United States*, 2 F. 2d 715 (1924). The mere fact that evidence has been obtained by eavesdropping standing alone has never been a ground for excluding the evidence.

"Appellants maintain that the officer's committed a trespass by inserting the spike into the party wall and that, therefore, the present case can be distinguished from *Goldman*. To the contrary, the record in this case clearly shows that there was no trespass. The evidence revealed that the spike was *eleven and three eighths inches in length* (J.A. 102) and that it actually went into the wall *less than halfway* (J.A. 61, 103, 104, 122, 157, 158, 255). The wall including the baseboard and moulding was *thirteen to fourteen inches in width* (J.A. 123, 214, 215). In order for the spike to have passed the midline of the party wall it would have had to have been inserted *at least over six and one-half inches* beyond the leading edge of the moulding in 410. The uncontradicted testimony of the Government witnesses established as fact that the spike did not penetrate the wall beyond the halfway mark.

"There was no trespass in law. The weight of authority and the law in the District of Columbia is that the owners of adjoining premises are not tenants in common of a party wall erected partly on the lands of each but that each owns in severalty the part which rests upon his side of the line with an easement of support from the other part. *Fowler* v. *Koehler*, 43 App. D.C. 349 (1915).

"In *Fowler* v. *Koehler, supra,* the Court stated, p. 356, 7:

> 'It is therefore a condition annexed to the title of every house lot in the City of Washington and when the proprietor builds a partition wall between himself and his neighbor he shall lay the foundation equally upon the lands of both; and that any person who shall afterwards use the partition wall or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use.'
>
> * * * * * * *
>
> "* * * The erection of a party wall does not change the boundaries nor affect the title of the respective properties. While it stands each party is permitted to use the wall. The right to its use and enjoyment passes with a conveyance of the properties and when for any reason, it ceases to exist, the rights of the respective owners stand as originally. (Emphasis supplied [*sic*].)

It is obvious, therefore, that the owner of 410 owned the party wall to the midline and that the only right that the other party had in his wall was a right of lateral support." (Emphasis added.)

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No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1960

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, PETITIONERS,

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 66

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 261-271) is reported at 275 F. 2d 173. The opinion of the district court denying the motion to suppress (R. 20-24) is reported at 166 F. Supp. 838.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1960 (R. 272-273). A petition for rehearing *in banc* was denied on March 8, 1960 (R. 278).

The petition for a writ of certiorari was filed on April 6, 1960, and was granted on May 31, 1960 (R. 278). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Evidence of petitioners' operation of a gambling establishment was obtained in part by listening from an adjoining building with the aid of a battery-operated amplifier connected to a short, needle-like antenna inserted in a pre-existing crack under the baseboard, part way but not through the party wall. The questions are:

1. Whether the listening constituted a "search" of petitioners' "house" in violation of the Fourth Amendment.

2. Whether a conviction based in part on that evidence deprived petitioners of liberty without due process of law in violation of the Fifth Amendment.

3. Whether the overhearing of words spoken into a telephone constituted an interception of a telephone communication in violation of Section 605 of the Communications Act.

4. Whether the evidence was otherwise inadmissible.

CONSTITUTIONAL AMENDMENT AND STATUTE INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and par-

ticularly describing the place to be searched, and the persons or things to be seized.

Communications Act (Act of June 19, 1934, 48 Stat. 605, 47 U.S.C. 605):

> SEC. 605. No person * * * not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *

STATEMENT

Petitioners were found guilty, after trial before a jury, under three counts charging gambling offenses under the District of Columbia Code. The court imposed upon each of the petitioners concurrent sentences of nine months' imprisonment and fines of $500 on

each of two of the counts, and of twenty months to five years on the remaining count (R. 30-34).

The sole issue presented here is the admissibility into evidence of conversations overheard by police officers with the aid of an electronic device.[1] Petitioners' pre-trial motion to suppress the evidence was denied (R. 20-24)[2] and the evidence was admitted at the trial over timely objections (R. 46-53). The rulings were affirmed on appeal, Judge Washington dissenting. The relevant facts may be summarized as follows:

The police, having reason to believe that premises at 408 21st Street, N.W., in the District of Columbia, were being used as a gambling establishment,[3] obtained from the owner of the adjoining row house at 410 21st Street, which was then unoccupied, permission to use the

[1] The conversations overheard with the device also formed part of the basis for a search warrant, and on that ground petitioners also sought to suppress the evidence obtained upon execution of the warrant. Since the microphoned conversations were themselves introduced into evidence at the trial, however, a decision that that evidence was illegally obtained would by itself require reversal of the convictions, and it is unnecessary to determine whether the search warrant would also fall. However, since the question would become important in a new trial, should this Court reverse the present convictions, we may note that petitioners are in error in asserting that it is "undisputed" that there was insufficient evidence to support the search warrant without the challenged conversations (Pet. Br. 13). To the contrary, it is our view that more than ample grounds for the warrant were established entirely apart from the evidence obtained with the listening device—*e.g.*, the advice of the informant, the installation of three separate telephone lines in a second-floor bedroom, and conversations overheard without use of the device (see *infra*).

[2] The motion was renewed and again denied after a superseding indictment had been returned (R. 9-19).

[3] They had been so told by an informant (R. 12). They also knew from telephone records that three telephones, on separate lines, had been installed on the second floor (R. 113).

premises as an observation post (R. 169-170): In late March or early April 1958, police detective Stone and Special Agent Bedingfield of the Internal Revenue Service entered the premises on two occasions to make preliminary tests of the feasibility of overhearing conversations emanating from No. 408 (R. 93).

The officers had an electronic amplifying device consisting of a small battery-operated amplifier and earphones, to which was attached an antenna referred to as a "needle" or "spike." It was not a true spike, as it could not be driven into a wall, due to the delicacy of the needle (R. 102-103, 161). The needle was 11¾ inches in length (R. 102). The police inspector in charge had not called for any search for heating ducts against which to place the device, and neither the detective nor the inspector had plans of the building (R. 140, 201-203). The officers searched along the second floor wall in No. 410, adjoining No. 408, for a crack into which the needle could be partially inserted, employing a trial-and-error probing under the baseboard with the wire of a straightened clothes-hanger (R. 115, 141-142). They did not remove or tamper with the baseboard (R. 116, 142) and they did not make a hole anywhere (R. 100).

The officers ultimately discovered a crevice extending part way into the party wall from a point between the floor and baseboard in the front room. This crevice was employed thereafter (R. 100, 115-117). The party wall was 13 to 14 inches thick[4] and the officers testified that they inserted the needle only about 5½ or 5⅞

[4] The dimensions of 13 to 14 inches included 8 inches of masonry wall, 1½ inches of plaster board, plaster, and furring on each side, and 1½ inches of molding on each side (R. 122-123).

inches, half of its length, at which point something solid blocked further insertion (R. 84, 100, 103-104, 122-123, 143, 148; cf. "Possibly" 6½ inches, R. 161).[5] Detective Stone considered the needle to be in contact with a good sounding board but could not tell what it was (R. 143, 157-158; see also R. 117). On one occasion during the preliminary tests, he was able to hear a conversation taking place on the first floor of No. 408 (R. 97-98, 105).

On April 22, 23, and 24, 1958, the special agents entered No. 410 and placed the needle of the amplifying device in the crevice previously discovered (R. 56-59, 61, 64, 67, 71-72, 83-84, 87-89). While one officer would listen by means of the device with earphones, the other would listen at the wall through which conversations were also audible at times. On occasion, an ordinary water glass would be placed against the wall (R. 72, 106-107, 124, 151-152). There were "a couple of places further back towards the middle of the wall

[5] Petitioners are in error in stating that government counsel "stipulated" that the needle was inserted "into the party wall six or seven inches" (Pet. Br. 6). The stipulation appears at R. 40, where counsel for petitioners asserted to the court that there was an insertion "between the premises" at the baseboard (R. 40). When the court asked government counsel whether the facts were admitted, the reply was, "Your Honor, the facts are these." Thereupon, in his restatement, government counsel characterized the antenna as having been "slipped" by the officers "under" the baseboard (R. 40). He stated no dimensions. At the close of the government's restatement, the court asked whether there was dispute as to the facts. Government counsel replied, "That is my version of the facts. I don't know whether Mr. Williams will agree with me." Mr. Williams replied, "I think there is no dispute, your Honor" (R. 40). Thereafter, in argument but in no sense in formal stipulation, government counsel made the loose reference seized upon by petitioners, referring to the insertion as 6 to 7 inches. At another point he said "about six inches" (R. 42).

up higher where one could place their ear to the wall and get fairly good reception" (R. 149). On April 29, 1958, Agent Jewell returned without the amplifying device and, by placing his ear against the wall, overheard petitioners Martin and Schwartz quoting odds (R. 68-69, 77-80). By these several techniques, the officers overheard petitioners engaging in numerous betting operations (R. 62-68, 74-75, 84-91, 120-125).

On the basis of their investigation—the conversations overheard, the surveillance of No. 408 from the outside, telephone company records, and knowledge of prior criminal records of some persons observed going into No. 408—the officers on April 30, 1958, obtained search and arrest warrants which were executed that afternoon (R. 69-70, 78, 126-127, 171-172). In the front bedroom of No. 408, the police officers found three telephones, constantly ringing with wagering inquiries; windows covered with black cloth; a rug against the wall between No. 408 and the row house further south, No. 406; a can and grate device for burning papers; and wagering paraphernalia including bet slips, collections slips, sporting event schedules, "line" (odds quotations) sheets (R. 128-139, 165-168, 175-183, 185-201), revealing acceptance of as much as $37,950 in wagers in a single day (R. 188).

SUMMARY OF ARGUMENT

I

Petitioners, asking the Court to overrule *Olmstead* v. *United States*, 277 U.S. 438, and *Goldman* v. *United States*, 316 U.S. 129, contend that the use of an electronic device to eavesdrop on private conversations is

per se an unreasonable search and seizure in violation of the Fourth Amendment. Whatever might be the result under other circumstances hypothesized by petitioners, on the facts of this case the use of the listening device was, we submit, neither unreasonable nor a search or seizure.

Although to a degree an invasion of privacy, eavesdropping without physical intrusion on the premises has always been considered a reasonable and permissible method of police investigation, and the use of an electronic device to aid the sense of hearing does not make the conduct essentially different. Here, moreover, the use of the device was both narrowly limited and justified by the prior knowledge of the police. Before employing the device, the police had good reason to believe that the premises were being used, not as a home, but as the office of an illegal gambling operation. The device was not used for a general surveillence of the private activities of the occupants, in the hope of finding them in some indiscretion, but for the limited and specific purpose of confirming the officers' reasonable belief that the premises were being used then and there to transact an illegal betting business. It was used intermittently, only for a few days, and only during "business" hours when the illegal activities were thought to be actually in progress. And since part of the conversations could in fact be overheard with the naked ear, the use of the device in fact resulted, not in the unveiling of otherwise secret conduct, but only in a relatively minor expansion of the scope of observation. In short, the device was used neither for a general fishing expedition nor to expose conduct otherwise immune

from police observation. It was used to expedite an orderly, well-justified, and careful investigation and violated neither tradition nor conscientious scruple.

It is established, in any event, that the overhearing, from outside the "house," of a conversation within is not a "search" of the "house" or "person" within the meaning of the Fourth Amendment. *Olmstead* v. *United States, supra; Goldman* v. *United States, supra; On Lee* v. *United States,* 343 U.S. 747. It was not against every invasion of privacy but only a particularly offensive form—physical intrusions into protected areas—that the Fourth Amendment was designed to protect. Nor is it accurate to say that the use of listening devices presents a problem that was not foreseen by the framers, for eavesdropping as a means of investigation could not have been unknown at the time the Amendment was adopted, and the improvement in the techniques of eavesdropping effected by the device used here does not make it something different in kind. If technological developments make protections beyond those provided by the Fourth Amendment appropriate, it is, we believe, for Congress, and not initially the courts, to provide them.

The established limitations on the scope of the Fourth Amendment cannot be avoided, as petitioners contend, by invoking instead the due process clause of the Fifth. The limited and special use made of the listening device here was, as we have seen, reasonable and inoffensive to civilized standards of proper police conduct. Nor is there any basis for excluding the evidence under the general supervisory powers of this Court, for those powers are exercised only to implement policies other-

wise established by law and there has been no congressional disapproval of the method of investigation used here.

II

To avoid the limitations of the *Goldman* case, petitioners claim that the evidence was in fact obtained by a trespass, contending that the party wall was owned in common and that the insertion of the needle of the amplifying device into the wall constituted a violation of their property rights whether or not it was inserted more than half-way (a question on which there were no explicit findings below). It seems clear, however, that in the District of Columbia party walls are owned in severalty with cross-easements of support, not in common, and that the only limitation on each party's use of his half of the wall is that he may not impair the structural support to which his neighbor is entitled. Moreover, even if the wall were owned in common, there would still be no trespass, for a tenant in common is not a trespasser on any part of the estate.

III

That some of the words overheard were spoken into a telephone plainly did not make the eavesdropping a violation of the Communications Act. What the officers "intercepted" were the sound waves emanating from the speaker, not the electrical impulses being transmitted over the telephone wires.

ARGUMENT

Petitioners' basic position is a broad one—that the use of electronic devices for the purpose of eavesdrop-

ping, no matter how used or where placed, is a violation of the right of privacy and an unreasonable search under the Fourth Amendment. They ask this Court expressly to overrule its prior holding to the contrary in *Goldman* v. *United States*, 316 U.S. 129. They seek to have evidence obtained by electronic hearing devices deemed excludable, either under the rule of suppression established for enforcement of the Fourth Amendment, as a requirement of due process under the Fifth Amendment, or in the exercise of the supervisory power of this Court to control the admission of evidence in federal courts. This part of their argument is based largely on a projection of theoretical situations, dependent on possible future developments in the field of electronics, and has virtually no relationship to the actual facts of this case. It is the government's position that what was done here, as to these petitioners, was reasonable police behavior which did not constitute an unwarranted intrusion on rights protected by the Fourth Amendment or a departure from civilized standards. There was thus no reason to exclude the evidence, either under the rule of exclusion or in the exercise of the supervisory power of this Court. In our view, if there is to be control of electronic devices used without physical invasion of premises, that control must come from Congress, and not initially from the courts.

More narrowly, petitioners argue that, in inserting a needle through a crack in the party wall, the officers committed a trespass, regardless of whether the needle penetrated more than half of the party wall, and that therefore the evidence was excludable. They also contend that overhearing one part of a telephone conversa-

tion, by the device used here, constituted an unlawful interception in violation of Section 605 of the Communications Act. We also show that neither of these more limited contentions has merit.

I

The Overhearing of Conversations Without any Physical Intrusion by the Police was a Reasonable Method of Investigation Which did not Violate the Constitutional Rights of Petitioners Under the Fourth Amendment or the Fifth Amendment.

A. *The conduct of the police was reasonable.*

Conversations deemed by the participants to be private are frequently overheard. No one who has been in a rooming house, a row house, a hotel, an apartment, or an office building, can be unaware of that fact. It has never been suggested that, if police, who are in a place where they have a right to be, take advantage of that well-known fact in detection of crime, their behavior is unreasonable or a violation of the right to privacy. Eavesdropping as such is not a violation of constitutional rights.

That is essentially this case. There is here present none of the elements ordinarily in question in search and seizure cases. The officers had a perfect right to be in No. 410. They made no entry whatsoever into petitioners' rooms. They did not bore a hole through the party wall or even into the wall, nor did they tamper with a baseboard or otherwise change the wall. It is undisputed that the short antenna of the amplifying device employed by the officers, a rod-like wire less than a foot in length and resembling a metal knitting needle, at no time penetrated into petitioners' room.

What the officers did was to take advantage of the position they could legitimately occupy in No. 410 to check by their sense of hearing the reliability of information they had received that petitioners were conducting an illegal gambling establishment in No. 408. They did this just as they endeavored by their sense of sight to observe petitioners' movements from a place outside the house. Petitioners do not suggest that, to the extent that the officers could hear by the naked ear, they did anything wrong.[6] Petitioners do not contend that, to the extent that the officers aided the naked ear by the use of a water tumbler held against the wall, they did anything wrong. Petitioners' basic position is that, because the sense of hearing was aided by an electronic device rather than a mechanical one, the police action became transformed into wholly unreasonable conduct.

This record affords no basis for that position. There is no warrant in this record for the assertion by petitioners as an uncontradicted fact that the use of the microphone in this case transformed a heating duct into a giant microphone. It is not at all clear that the microphone needle hit a heating duct, despite the testimony of petitioners' witnesses, based on observations made largely in March 1959, eleven months after the event (during half of which time petitioner Martin

[6] The testimony of the officers to the effect that they could at times hear by the naked ear was in no way contradicted. Even petitioners' witnesses did not serve to contradict that fact. Their testimony was that the lowest decibel count they heard through the wall was eighty-seven and that sixty-five is normal conversation (R. 225). Not all telephone conversations are conducted in normal or reserved tones.

was in possession of No. 408), which attempted to suggest that such was the fact. It is unnecessary at this point to try to determine what it was that blocked the antenna—a matter as to which no finding was made by the district court.[7] The record makes it quite clear that, whatever the antenna hit, it did not have the broadcasting effect that petitioners attempt to impute to it. Detective Stone, who testified that he considered that the microphone was making contact with a good sounding board (R. 158), by his testimony also showed that the amplification did not have the gigantic character that petitioners suggest. Quite spontaneously, in answer to a question on cross-examination as to his listening in on the microphone on April 23, Stone said (R. 151):

> * * * But as to that, Agent Jewell seemed to have a little better ears and he was a little better at using it and catching that conversation on the microphone.
>
> And as a result, he did use the microphone a little more than Agent Bedingfield or myself.

Stone testified that it "wasn't always easy" to hear the conversations on the microphone (R. 151).

Moreover, there was no general amplification. The hearing device was taken into an empty house each day that the officers went there and was taken away

[7] Clearly, the officers were not looking for a duct—they obtained no blueprints until after the arrests, and they had not discussed such a placement. They sought any crevice where they could place the needle, and they did so by a pure trial-and-error probing by means of a coat-hanger (*supra*, p. 5).

each time they left (R. 152). Only one officer at a time used the device, employing ear phones for that purpose. It was employed only after the officers had reason to believe, from advice by an informant and from telephone records that three lines had been installed (R. 113), that the premises were being used, not as a home, but as the office of an illegal gambling operation.

The use of the device here was, therefore, not essentially different in character from the use of a water tumbler on the wall as an aid to hearing. There is thus no reason why its use should have legal implications different from those which would attach to the use of a water tumbler. So long as the agents were where they had a right to be, so long as there was no physical intrusion into petitioners' premises, there was no violation of petitioners' rights. The overhearing of conversations by the police in the setting of the instant case, as part of an orderly, well-justified, and careful investigation, violates no tradition or conscientious scruple.

B. *The overhearing of petitioners' words from outside was neither a "search" nor "seizure" of petitioners' "persons", "houses", or "effects".*

The Fourth Amendment guarantees the right of the people to be secure "in" their "houses" against unreasonable "searches and seizures" (*supra*, p. 2).

In *Olmstead* v. *United States*, 277 U.S. 438, this Court held that the overhearing, at a point outside the "house", of a conversation within, by means of a mechanical contrivance, is not violative of rights under the Fourth Amendment, there being no searching of

an individual's "house", "person", "papers", or "effects". In *Olmstead*, the conversation was overheard by wire-tapping, at a time prior to the enactment of federal legislation on the subject. There, as here, an effort was made to stretch the concept of the language, "search" of a "house", by urging that in listening on phone wires outside the house the listeners would somehow "project themselves" into the house (277 U.S. at 444). This Court, after extensive review of numerous decisions which it distinguished as instances of outright compulsion to produce documents (*Boyd* v. *United States*, 116 U.S. 616), of true physical entries into the "house", or outright seizures (outside the house) of actual physical "papers or effects", concluded as to the argued projection into the house (277 U.S. at 464):

> There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

The Court stated that there was no justification for enlargement of the words "search and seizure" so "as to forbid hearing or sight" (277 U.S. at 465). And further (277 U.S. at 466):

> Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

That ruling has been consistently approved by this Court. *Goldstein* v. *United States*, 316 U.S. 114, 120; *Goldman* v. *United States*, 316 U.S. 129, 135; *On Lee* v. *United States*, 343 U.S. 747, 766; see also *United States* v. *Dennis*, 183 F. 2d 201, 225 (C.A. 2), affirmed, 341 U.S. 494. *Olmstead* has never been overruled.

In *Goldman* v. *United States, supra*, 316 U.S. 129, law officers placed a detectaphone against a wall to listen to conversations in an adjoining office. There, as here, in an effort to distinguish *Olmstead* v. *United States, supra*, the defendants argued to this Court that the employment of the device violated the Fourth Amendment because persons talking in the office did not assume the risk of the use of a delicate detector (316 U.S. at 135). The Court rejected the attempted distinction and refused to overrule *Olmstead*.

Petitioners' argument that it should make no difference whether police are listening with a device concealed inside or outside the premises (Pet. Br. 21) ignores the purpose of the Fourth Amendment to protest against physical intrusions into protected areas. Where a trespass has been committed in order to plant a transmitting device, a camera, or a person, "it might, with reason, be claimed" that there is a continuing trespass (*Goldman* v. *United States*, 316 U.S. 129, 134-135) and therefore a violation of the rights which the Fourth Amendment was designed to protect. This is the reason for the stress in the *Goldman* case upon the fact that a prior trespass bore no significant relation to the later placing and use of the detectaphone. This is not a purely technical distinction. Eavesdropping on a conversation from a place outside the

home is in a sense a violation of privacy just as secret visual observation from a place outside the home (see *On Lee* v. *United States*, 343 U.S. 747, 754; *United States* v. *Lee*, 274 U.S. 559, 563) may be a violation of privacy. Neither, however, is the type of violation of privacy which is condemned by the Fourth Amendment because neither involves an entry of any kind. *On Lee* v. *United States*, 343 U.S. at 752-754. It is not wholly correct to say, as Mr. Justice Brandeis said in his dissent in *Olmstead*, that at the time of the framing of the Constitution, "Force and violence were then the only means known to man by which the Government could directly effect self-incrimination" (277 U.S. at 473). Eavesdropping and secret visual observation cannot have been unknown in law enforcement at the time the Constitution was adopted. Had the framers of the Constitution desired to create an absolute unlimited right of privacy and a "due process" that went to the extent of preventing all observations from outside by law enforcement officers, they could have stated that right explicitly, as they did the right against any unreasonable search of the "person", the "house" and the "papers, and effects". In what was expressed by the framers we can perceive what was excluded. The framers banned compulsion and physical taking—the compulsion by means of the hated general writs and warrants of that day, and the taking by physical entries into homes and searches and seizures of the person and property. But in the absence of entry and compulsion, with their particular type of offensiveness and invitation to violence, the framers left observation from without to the precautions and in-

genuity of those within[8] and to the more flexible and precise controls that the congress and state legislatures might employ.[9] Unreasonable compulsion and force were the targets of the writers of the Constitution. It is no answer to urge that other aspects of privacy are equally important and should also be protected. Whether they should or should not be, the Fourth Amendment does not reach them.[10] Congress can protect areas outside the scope of the Fourth Amendment, as it has done by Section 605 of the Communications Act. And, as we develop more fully, *infra*, we think that in this area which lies outside the scope of the Fourth Amendment, if control is to come, it must come from Congress.

C. *Since in this case the action of the officers was reasonable, the overheard conversations are not excludable under principles of due process.*

Petitioners argue that, even if there was no violation of the Fourth Amendment, the conversations overheard by the use of the amplifier should be deemed excludable as a violation of due process or in the exercise of the supervisory power of this Court. This argument for the most part is unrelated to the facts in this case. As discussed, *supra*, the police action here was, in its total

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[8] Such as, in this case, the hanging of a rug on the common wall between No. 408 and No. 406 (see fn. 7, *supra*).

[9] It should be recalled, in evaluating the dissents in *Olmstead*, *supra*, that the wire-tapping there involved had already been made an offense under the state statute.

[10] "It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by far-fetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties to an unreasonable search or seizure." *On Lee v. United States*, 343 U.S. at 754.

setting, reasonable. It was special and limited and not such as to shock the conscience of the scrupulous.

The reasonableness of what was done in this case is emphasized by contrasting it with the conduct in *Irvine v. California*, 347 U.S. 128, on which petitioners rely. There, officers had a key made to Irvine's home and bored a hole in the roof. They entered the home repeatedly to install a secret microphone and to move it about from time to time. The microphone remained constantly in use so that the officers for months could listen to all conversations in various rooms of the home, including the bedroom. Each of the entries was a trespass and probably a burglary for which an unofficial person would be severely punished.

Here, there was no trespass and no entry of any kind. There was merely the use of an existing crack in a party wall. The place, with good reason, was believed to be, not a home, but the office of an illegal gambling establishment. The microphone was not a permanent installation but was used from time to time during business hours. The amplification was not general but was limited to one officer using earphones. In no appropriate sense can the action here be compared with that in *Irvine*.

Petitioners conjure up various possibilities of what may develop in the future as to some other devices not used here. This *in terrorem* argument has no relevancy with respect to petitioners' argument that the evidence *in this case* should be excluded as obtained in violation of due process. Since there has been no invasion of rights of privacy guaranteed by the Fourth Amendment, the evidence would be excludable under the Fifth

Amendment only if, in the particular circumstances, the action of law enforcement officers was such as to offend civilized standards. This is made clear by *Rochin v. California*, 342 U.S. 165. Normally, the states may control the admission of evidence in their courts. But when, in a particular case, as in *Rochin*, specific police action is deemed to extend beyond acceptable standards, this Court has held that the use of such evidence is barred by concepts of due process. Necessarily, the application of this doctrine must depend on the actual facts of the case before the Court, and not upon the theoretical possibilities of what may occur in some other case. There is thus no occasion to invoke the Fifth Amendment in this case on the basis of what may occur in the future.

D. *There is no occasion for exercise of the supervisory power of this court to control evidence, for that power is normally exercised in implementation of a policy established by Congress and Congress has laid down no policy as to the device here in question.*

Petitioners ask this Court to exclude the evidence at issue here in the exercise of its supervisory power to control the reception of evidence in federal courts. Again, except for the unjustified characterization of the device here as turning a heating duct into a giant microphone, their argument rests mainly on the fear of potential developments in the field of electronics.

The fear of advances in technology was also in large part the basis of the dissent of Mr. Justice Brandeis in *Olmstead v. United States*, 277 U.S. at pp. 473-474

(Pet. Br. 14-15) on which petitioners rely. The fears expressed by Mr. Justice Brandeis more than 30 years ago have not, however, materialized. There is still no way "by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home" (*Id.*, 474). The "intimate occurrences" still can be photographed only, as 30 years ago, if an opening is left for the camera lens; otherwise there must be such breaking of a hole into the house through a wall, or such other entry, as would be violative of the Fourth Amendment today as it was at the time of *Olmstead*. So also, the possibility of using amplifying devices which do not require physical contact is still largely theoretical. At present, eavesdropping without trespass is feasible only in limited situations, such as that here.

In any event, and more basically, if future developments in the field of electronics are to be the subject of control, it is, we believe, for Congress to decide the nature of the controls. Congress did in fact legislate with respect to the particular aspect of eavesdropping with which *Olmstead* dealt—wire-tapping. As to electronic devices of the type here involved, however, Congress has not chosen to take any action, despite the period of almost twenty years that have elapsed since the decision of this Court in *Goldman* v. *United States*, 316 U.S. 129. The question of policy with respect to wire-tapping and controlling other forms of electronic devices is, as petitioners note, (Pet. Br. 22), a matter which has already received congressional attention. It

will undoubtedly receive more attention in the future. We think it is the task of Congress, not initially of the courts, to evolve a policy with respect to the use of electronic devices that do not themselves involve a violation of constitutional rights.

This Court has excluded evidence under its supervisory power only when such exclusion is in implementation of a policy which has theretofore been fixed by the Constitution or by Congress. See *On Lee* v. *United States*, 343 U.S. 747, 755. Thus after Congress, by the enactment of Section 605 of the Communications Act, laid down its policy against wire-tapping, this Court ruled in *Nardone* v. *United States*, 302 U.S. 379 and 308 U.S. 338, that evidence obtained by wire-tapping was inadmissible in federal courts. See also *Benanti* v. *United States*, 355 U.S. 96. Similarly, the decision of this Court in *McNabb* v. *United States*, 318 U.S. 332, outlawing confessions obtained during an unreasonable delay in arraignment, was in implementation of the congressional policy, now embodied in Rule 5, F.R. Crim. P., requiring prompt arraignment.

In this case, there is no equivalent constitutional or congressional policy which would justify the exclusion of the evidence. Indeed, to the extent that Congress has *not* legislated on the use of electronic devices which do not constitute an interception of a communication, whereas it *has* legislated on the subject of wire tapping, the congressional policy has given tacit approval to the rule laid down by this Court in *Goldman* v. *United States*, 316 U.S. 129, almost twenty years ago. The use of the amplifying device to over-

hear petitioners' conversations violated neither constitutional rights nor congressional policy. There is thus no occasion for the exercise of the supervisory power of this Court.

II

There Was no Trespass in This Case

Petitioners contend that, even if the rule of *Goldman v. United States*, 316 U.S. 129, is adhered to, the evidence in this case should be deemed excludable as obtained by trespass—and this without regard to whether the needle of the microphone extended further than one half of the party wall.[11] They argue that they were tenants in common of the whole party wall and that therefore any insertion into the party wall was a trespass onto their property. There is no merit in this contention, whatever view is taken of the rights in a party wall.

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[11] The party wall was 13 to 14 inches thick and the needle of the amplifying device, according to the testimony of the officers, penetrated only 5⅞ inches. It was thus at least half an inch short of petitioners' half of the wall (see the Statement, *supra*, pp. 5-6).

The testimony of the officers, who were actually at the scene in April 1958, was not overborne by the testimony of petitioners' witnesses who first examined the wall in March 1959. Petitioners' witnesses testified that the party wall was solid masonry except for a 9-inch wide area behind the heating duct for No. 408, where there was no masonry and concluded that the needle could have entered the wall only at some point along that 9-inch area (R. 210, 223). Since the back of the duct disclosed a small dent to two witnesses (R. 213, 223), two dents to another (R. 233), they inferred the needle must have reached this dent. The point of entry was assumed to be an oval indentation in the molding of No. 410, 18 inches from the front wall (R. 209), and on this basis the distance to the dent was stated at 7⅛ inches by two of petitioners' witnesses (R. 215, 235). A third who spoke generally of insertions

A. *Petitioners' title, under District of Columbia law, extended only to the midpoint of the wall and was not a tenancy in common of the entire wall.*

Since the officers did not themselves go into petitioners' room and since, moreover, the needle of their amplifying device, under any view of the facts, remained more than half a foot short of the room, petitioners seek to extend the boundary of what they claim as their "house" under the Fourth Amendment by asserting a tenancy in common of the entire party wall (Pet. Br. 25), so that a penetration of even the far side of the wall may be urged to be a "search" of their "house."

However, under the law of the District of Columbia, as under the preponderant weight of authority, the ownership of a party wall is in severalty, and extends only to the midpoint, with only reciprocal easements permitting the use of the wall by both parties.

The Court of Appeals of the District of Columbia stated in *Fowler* v. *Koehler*, 43 App. D.C. 349, 357:

> The erection of a party wall * * * amounts only to the establishment of a mutual easement or servitude and benefit. * * *. The erection of a party wall does not change the boundaries nor affect the title

behind the duct gave the distance as 6½ inches or 7 inches (R. 224). Since there was at least a 9-inch area along which the needle might have entered, even according to petitioners' witnesses, and since it was impossible to account for possible changes in the intervening eleven months, there would be no reason, on the basis of this speculative testimony, not to credit the testimony of the government witnesses that the needle did not extend more than half the distance of the party wall. The majority below stated that the record justified the conclusion that there was no physical trespass upon petitioners' half of the wall (R. 268).

> of the respective properties. While it stands, each party is permitted to use the wall. * * *.
>
> At common law it was defined as a wall of which two adjoining owners are tenants in common [citing English decisions]. In this country, many of the States have adopted the rule that the owners of a party wall erected in part upon the land of each are not tenants in common of the wall, but are owners in severalty of the part standing upon his land, subject to the easement of his neighbor for its support and the equal use thereof. * * * [citing state decisions].

As appears from its own citation of authorities, that decision was not based on an isolated or peculiar doctrine, but is in accord with the preponderant weight of authority.[12]

According to Tiffany (3 Tiffany, *Real Property* (3rd ed. 1939) 228), "In this country, no such presumption [tenancy in common] has ever been recognized, and a party wall almost invariably belongs to the fourth class mentioned above [separate ownership with easement for support], except in the few cases in which * * * built entirely on the land of one proprietor. * * *."

Professor Powell (5 Powell, *Real Property* (1956) 237-238), explaining the basic reasoning, observes that

[12] We do not understand upon what basis petitioners cite *Fowler* v. *Kochler* as supporting their theory that a party wall is held by tenancy in common in the District of Columbia (Pet. 12). Petitioners' additional citation, to the same effect, of the earlier case of *Moore* v. *Shoemaker*, 10 App. D.C. 6, apparently refers only to a dictum in that case, for the nature of the ownership was not in issue, the question being as to rights to support from a neighboring building whose wall never became a party wall. (10 App. D.C. at 14: "In this case the original division wall * * * was clearly not a party wall.").

the English courts prior to 1925 and American courts "in a few instances" had presumed the existence of a tenancy in common. He points out that the tenancy in common theory fails to serve the mutuality of benefit which is the basic justification for any party wall. As soon as the tenants in common have severed their common ownership by partition, one owner could pare away his half of the wall without liability for injuries thereby caused to his neighbor. The English Law of Property Act of 1925 directed that the presumption of cross-easements be made, and in the United States the cross-easement theory has found "wide acceptance" (*Id.* 238).

B. *The Use of a Party Wall is not Restricted so Long as There is no Interference with Support of the Building.*

It need scarcely be labored that it is no concern of the owner of half a party wall what the adjacent owner does with his other half so long as the structure is not weakened for the support of both the adjacent buildings. In common practice, persons drive nails into their side of the walls, decorate the walls as they see fit, and even cut bookcase alcoves, phonograph emplacements, or other indentations into their half of the wall. The decisions support a variety of uses. Thus, use of the wall for advertising purposes has been sustained. *Wilensky* v. *Robinson,* 203 Ga. 423, 429; *Lappan* v. *Glunz,* 140 Mich. 609; *Shiverick* v. *R. J. Gunning Co.,* 58 Neb. 297, reversed on other grounds 59 Neb. 73. One side of the wall may be built upon to raise that side higher than the adjoining building. *Andrae* v. *Haseltine,* 58 Wis. 395. As observed by

Tiffany (3 Tiffany, *supra*, 337), "It has been decided in one case that when a party wall is erected * * * one proprietor can extend his beams into the wall only so far as the limits of his own land, and there are occasional intimations to this effect in other cases. There cannot well be, however, any absolute rule to this effect. * * *."

Petitioners cite *Bartley* v. *Spaulding*, 21 D. C. 47, for its holding that windows were not permitted to be cut through a party wall (Pet. Br. 26). But in that case the windows were cut through the entire wall and a weakening of the wall was feared. The court held that the wall was to be restored not by a mere patch but as a continuous wall, as a patch would "not give the support to the wall that it should have as a party wall" (21 D.C. at 50). The same inapposite facts and considerations were involved in *Corcoran* v. *Nailor*, 17 D.C. 580, also cited by petitioners, holding that a wall which was permitted to be built in part on another's land, only for the purpose of serving as a party wall, could not contain 22 windows. And see the cases collected in 10 L.R.A.N.S. 1191-1194.

C. *Assuming arguendo a tenancy in common, the officers could not be considered trespassers in any part of the wall.*

If petitioners' theory of a tenancy in common in the party wall were accepted for the purpose of argument, petitioners could not gain thereby. For, as observed by the trial judge, both tenants of a tenancy in common are entitled to possession of every part of the affected property—"neither one is trespassing when he enters upon

the party wall, because a tenant in common can not, if I recall my Law of Real Property correctly, can not be guilty of trespass" (R. 41). Or, as stated by Professor Powell, "The characteristic attribute of a tenancy in common is unity of possession. This means that each of the coowners * * * shares with his cotenants one single right to possession, which right applies to every part of the affected property. * * *." 4 Powell, *Real Property* (1956) 595.

Thus, if there were a true tenancy in common, the officers would be free to use not alone their own half of the wall but rather the entirety of the wall so long as they did not block concurrent use by petitioners. A tenant in common is not a trespasser on any part of the estate.

III

There Was no Violation of the Communications Act

There is no merit to petitioners' argument that the Communications Act was violated because some of the words overheard from No. 408 were spoken into a telephone. *Goldman* v. *United States,* 316 U.S. 129, 133-134; *Irvine* v. *California,* 347 U.S. 128, 131; cf. *On Lee* v. *United States,* 343 U.S. 747, 754. The Communications Act protects only the means of telephonic communication—namely, the transmission of electrical impulses from the speaker to the recipient. What was picked up by the listening device were petitioners' spoken words carried by sound waves, not the electrical impulses carried by the telephone wires. Whether the words spoken were directed to a telephone receiver or to another person in the same room is irrelevant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1960.

Julius Silverman, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 6, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners were tried and found guilty in the District Court for the District of Columbia upon three counts of an indictment charging gambling offenses under the District of Columbia Code. At the trial police officers were permitted to describe incriminating conversations engaged in by the petitioners at their alleged gambling establishment, conversations which the officers had overheard by means of an electronic listening device. The convictions were affirmed by the Court of Appeals, 275 F. 2d 173, and we granted certiorari to consider the contention that the officers' testimony as to what they had heard through the electronic instrument should not have been admitted into evidence. 363 U. S. 801.

The record shows that in the spring of 1958 the District of Columbia police had reason to suspect that the premises at 408 21st Street, N. W., in Washington, were being used as the headquarters of a gambling operation. They gained permission from the owner of the vacant adjoining row house to use it as an observation post. From this vantage point for a period of at least three consecutive days in April 1958, the officers employed a so-called "spike mike" to listen to what was going on within the four walls of the house next door.

The instrument in question was a microphone with a spike about a foot long attached to it, together with an amplifier, a power pack, and earphones. The officers inserted the spike under a baseboard in a second-floor room of the vacant house and into a crevice extending several inches into the party wall, until the spike hit something solid, "that acted as a very good sounding board." The record clearly indicates that the spike made contact with a heating duct serving the house occupied by the petitioners, thus converting their entire heating system into a conductor of sound. Conversations taking place on both floors of the house were audible to the officers through the earphones, and their testimony regarding these conversations, admitted at the trial over timely objection, played a substantial part in the petitioners' convictions.[1]

Affirming the convictions, the Court of Appeals held that the trial court had not erred in admitting the officers' testimony. The court was of the view that the officers' use of the spike mike had violated neither the Communications Act of 1934, 47 U. S. C. § 605, cf. *Nardone* v. *United States*, 302 U. S. 379, nor the petitioners' rights under the Fourth Amendment, cf. *Weeks* v. *United States*, 232 U. S. 383.

In reaching these conclusions the court relied primarily upon our decisions in *Goldman* v. *United States*, 316 U. S. 129, and *On Lee* v. *United States*, 343 U. S. 747. Judge

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[1] Alleging that the conversations thus overheard had been the basis for a search warrant under which other incriminating evidence was discovered at 408 21st Street, N. W., the petitioners sought unsuccessfully to suppress the evidence obtained upon execution of the warrant. It is the Government's position that there were ample grounds to support the search warrant, even without what was overheard by means of the spike mike. We deal here only with the admissibility at the trial of the officers' testimony as to what they heard by means of the listening device, leaving a determination of the warrant's validity to abide the event of a new trial.

Washington dissented, believing that, even if the petitioners' Fourth Amendment rights had not been abridged, the officers' conduct had transgressed the standards of due process guaranteed by the Fifth Amendment. Cf. *Irvine v. California*, 347 U. S. 128.

As to the inapplicability of § 605 of the Communications Act of 1934, we agree with the Court of Appeals. That section provides that ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . . ." While it is true that much of what the officers heard consisted of the petitioners' share of telephone conversations, we cannot say that the officers intercepted these conversations within the meaning of the statute.

Similar contentions have been rejected here at least twice before. In *Irvine* v. *California*, 347 U. S. 128, 131, the Court said: "Here the apparatus of the officers was not in any way connected with the telephone facilities, there was no interference with the communications system, there was no interception of any message. All that was heard through the microphone was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone." In *Goldman* v. *United States*, 316 U. S. 129, 134, it was said that "The listening in the next room to the words of [the petitioner] as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room."

In presenting here the petitioner's Fourth Amendment claim, counsel has painted with a broad brush. We are asked to reconsider our decisions in *Goldman* v. *United*

States, *supra*, and *On Lee* v. *United States*, *supra*. We are told that re-examination of the rationale of those cases, and of *Olmstead* v. *United States*, 277 U. S. 438, from which they stemmed, is now essential in the light of recent and projected developments in the science of electronics. We are favoured with a description of "a device known as the parabolic microphone which can pick up a conversation three hundred yards away." We are told of a "still experimental technique whereby a room is flooded with a certain type of sonic wave," which, when perfected, "will make it possible to overhear everything said in a room without ever entering it or even going near it." We are informed of an instrument "which can pick up a conversation through an open office window on the opposite side of a busy street." [2]

The facts of the present case, however, do not require us to consider the large questions which have been argued. We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society. Nor do the circumstances here make necessary a re-examination of the Court's previous decisions in this area. For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners. As Judge Washington pointed out without contradiction in the Court of Appeals: "Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police

[2] See Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2d Sess., on Wiretapping, Eavesdropping, and the Bill of Rights; Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., on Wiretapping; Dash, Knowlton and Schwartz, The Eavesdroppers (Rutgers University Press, 1959), pp. 346–358.

admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants." 275 F. 2d, at 179.

Eavesdropping accomplished by means of such a physical infrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights. In *Goldman* v. *United States*, *supra*, the Court held that placing a detectaphone against an office wall in order to listen to conversations taking place in the office next door did not violate the Amendment. In *On Lee* v. *United States*, *supra*, a federal agent, who was acquainted with the petitioner, entered the petitioner's laundry and engaged him in an incriminating conversation. The agent had a microphone concealed upon his person. Another agent, stationed outside with a radio receiving set, was tuned in on the conversation, and at the petitioner's subsequent trial related what he had heard. These circumstances were held not to constitute a violation of the petitioner's Fourth Amendment rights.

But in both *Goldman* and *On Lee* the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In *Goldman* there had in fact been a prior physical entry into the petitioner's office for the purpose of installing a different listening apparatus, which had turned out to be ineffective. The Court emphasized that this earlier physical trespass had been of no relevant assistance in the later use of the detectaphone in the adjoining office. 316 U. S., at 134–135. And in *On Lee*, as the Court said, ". . . no trespass was committed." The agent went into the petitioner's place of business "with the consent, if not by the implied invitation, of the petitioner." 343 U. S., at 751–752.

The absence of a physical invasion of the petitioner's premises was also a vital factor in the Court's decision in *Olmstead* v. *United States*, 277 U. S. 438. In holding that the wiretapping there did not violate the Fourth Amendment, the Court noted that "[t]he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses." 277 U. S., at 457. "There was no entry of the houses or offices of the defendants." 277 U. S., at 464. Relying upon these circumstances, the Court reasoned that "[t]he intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched." 277 U. S., at 465.

Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law. See *Jones* v. *United States*, 362 U. S. 257, 266; *On Lee* v. *United States*, *supra*, at 752; *Hester* v. *United States*, 265 U. S. 57; *United States* v. *Jeffers*, 342 U. S. 48, 51; *McDonald* v. *United States*, 335 U. S. 451, 454.

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there

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See *Fowler* v. *Koehler*, 43 App. D. C. 349.

be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States*, 116 U. S. 616, 626–630.[4] This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

A distinction between the detectaphone employed in *Goldman* and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The court was "unwilling to believe that the respective rights are to be measured in fractions of inches." But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely; by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635. We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch.

Reversed.

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[4] William Pitt's eloquent description of this right has been often quoted. The Late Judge Jerome Frank made the point in more contemporary language: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *United States* v. *On Lee*, 193 F. 2d 306, 315–316 (dissenting opinion).

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1960.

Julius Silverman, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 6, 1961.]

Mr. Justice Douglas, concurring.

My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy according to *Goldman* v. *United States*, 316 U. S. 129, while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other. The concept of "an unauthorized physical penetration into the premises," on which the present decision rests, seems to me to be beside the point. Was not the wrong in both cases done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not measure of the injury. There is in each such case a search that should be made, if at all, only on a warrant issued by a magistrate. I stated my views in *On Lee* v. *United States*, 343 U. S. 747, and adhere to them. Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with

whether the privacy of the home was invaded. Since it was invaded here, and since no search warrant was obtained as required by the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure, I agree with the Court that the judgment of conviction must be set aside.

SUPREME COURT OF THE UNITED STATES

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[March 6, 1961.]

Mr. Justice Clark and Mr. Justice Whittaker, concurring.

In view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion.